TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 37

HEWITT-ROBINS INCORPORATED, PETITIONER,

vs.

EASTERN FREIGHT-WAYS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 11, 1961
CERTIORARI GRANTED JANUARY 8, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 491

HEWITT ROBINS INCORPORATED, PETITIONER,

vs.

EASTERN FREIGHT-WAYS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MARCH 6, 1962

[fol. A] [File endorsement omitted]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HEWITT-ROBINS INCORPORATED, Plaintiff-Appellant,

—*against*—

EASTERN FREIGHT-WAYS, INC., Defendant-Appellee.

On Appeal from the District Court of the United States for the Southern District of New York

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Civil Case No. 107-319

Appellant's Appendix

[fol. 1]

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

HEWITT-ROBINS INCORPORATED, Plaintiff,

—against—

EASTERN FREIGHT-WAYS, INC., Defendant.

COMPLAINT—Filed March 6, 1956

Plaintiff, by Harry Teichner, Esq., its attorney, complaining of the defendant, respectfully alleges:

As a First Separate Count:

1. Plaintiff is a corporation incorporated under the laws of the State of New York and defendant is a corporation incorporated under the laws of the State of New Jersey. The action arises under Part II of the Interstate Commerce Act, U. S. Code, Title 49, Sections 301 to 327, inclusive, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. Defendant is a common carrier by motor vehicle which holds itself out to the general public to engage in the transportation by motor vehicle in interstate commerce of property for compensation between points in the State of New York. The transportation which gives rise to the complaint herein was performed in and through the States of New York, New Jersey and Pennsylvania. As such common carrier, the defendant was and is subject to the provisions of the Interstate Commerce Act, Part II, as amended.

[fol. 2] 3. During the period from about January 1, 1953 to about February 1, 1955, plaintiff delivered to the defendant at Buffalo, New York, numerous shipments of upholstering foam rubber pads in cartons, for transportation to New York City, New York, and similar shipments were

delivered to the defendant at New York City, New York, for transportation to Buffalo, New York.

4. The defendant charged and collected from the plaintiff charges for such transportation which were based on the defendant's interstate rates as published in tariffs on file with the Interstate Commerce Commission.

5. During the period in which the aforesaid shipments moved the defendant was authorized to operate between Buffalo, New York, and New York City, New York, over intrastate routes, and the defendant's intrastate rates for the transportation of the aforesaid commodity between said points as published in tariffs on file with the Public Service Commission of the State of New York, were lower than the rates and charges assessed and collected by the defendant from the plaintiff on the transportation of the aforesaid shipments.

6. The aforesaid rates charged and the resulting transportation charges on the aforesaid shipments, and the practice of the defendant in misrouting the shipments by transporting them over the higher-rated interstate route, were unjust and unreasonable in violation of Section 216, Part II, of the Interstate Commerce Act, (U. S. Code, Title 49, Section 316). The reasonable rates should have been not in excess of the aforesaid intrastate rates; and the reasonable practice of the defendant should have been to route the said shipments over the lower-rated intrastate route.

7. By reason of the facts stated in the foregoing paragraphs, the plaintiff has been subjected to misrouting practices on the part of the defendant and to the payments of [fol. 3] rates and charges for transportation which were unjust and unreasonable in violation of Section 216, Part II, of the Interstate Commerce Act, and plaintiff has been injured thereby to its damage in the sum of Ten Thousand ($10,000.00) Dollars, which amount is equivalent to the difference between the charges exacted by the defendant and paid by the plaintiff and the charges that would have accrued at the just and lawful rates.

8. Upon the commencement of this action the plaintiff will file a formal complaint with the Interstate Com-

merce Commission, alleging the foregoing facts and requesting that an order be made by the Interstate Commerce Commission determining the reasonable and just rates for the transportation of the aforesaid shipments, and plaintiff respectfully requests that the determination of the issues in this action be held in abeyance until the Interstate Commerce Commission shall make its order as aforesaid.

As a Second Separate Count:

9. Plaintiff is a corporation incorporated under the laws of the State of New York and defendant is a corporation incorporated under the laws of the State of New Jersey. The matter in controversy exceeds, exclusive of interest and costs the sum of $3,000.00.

10. Defendant is a common carrier by motor vehicle which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of property for compensation between points in the State of New York. As such common carrier, the defendant was and is subject to the provisions of the Public Service Law of the State of New York.

[fol. 4] 11. During the period from about January 1, 1953 to about February 1, 1955, plaintiff delivered to the defendant at Buffalo, New York, numerous shipments of upholstering foam rubber pads in cartons, for transportation to New York City, New York, and similar shipments were delivered to the defendant at New York City, New York, for transportation to Buffalo, New York.

12. During the period in which the aforesaid shipments moved the defendant was authorized to operate between Buffalo, New York, and New York City, New York, over interstate routes through the States of New York, New Jersey and Pennsylvania.

13. The defendant charged and collected from the plaintiff charges for the transportation of the aforesaid shipments which were based on the defendant's interstate rates

as published in tariffs on file With the Interstate Commerce Commission.

14. If the said shipments were transported by the defendant over its intrastate routes, the defendant should have charged and collected rates and charges for such transportation based on tariffs on file with the Public Service Commission of the State of New York, which were lower than the rates and charges assessed and collected by the defendant from the plaintiff.

15. If the said shipments were transported by the defendant over its intrastate routes, the plaintiff has been subjected to the payment of rates and charges for transportation which were, when exacted, greater compensation than the rates and charges specified in the tariffs on file with the Public Service Commission of the State of New York, and in effect at the time, in violation of Section 63-t of the Public Service Law of the State of New York, to the plaintiff's damage in the sum of $10,000.00, which amount is equivalent to the difference between the charges [fol. 5] exacted by the defendant and paid by the plaintiff and those that would have accrued at the lawfully applicable rates.

Wherefore, plaintiff demands judgment against the defendant in the sum of $10,000.00, with appropriate interest and costs, including a reasonable attorney's fee.

Harry Teichner, Attorney for Plaintiff.

District Court of the United States

Southern District of New York

[Title omitted]

Answer—Filed March 30, 1956

Defendant, by its attorneys Goldman and Drazen, answering the plaintiff's complaint, respectfully shows to this Court and alleges:

As to the First Count:

1. Denies having any knowledge or information thereof sufficient to form a belief as to each and every allegation set forth and contained in paragraph 1 of the Complaint.

[fol. 6] 2. Admits that defendant is a common carrier by motor vehicle and engages in the transportation of property in interstate commerce and, except as specifically admitted herein, denies each and every allegation set forth and contained in paragraph 2 of the Complaint.

3. Admits that between January 1, 1953, and February 1, 1955, the defendant received shipments of property from the plaintiff for transportation between Buffalo, New York, and New York, New York, and except as specifically admitted herein, denies each and every allegation set forth and contained in paragraph 3 of the Complaint.

4. Admits that defendant's charges for transportation of plaintiff's property were based upon the tariffs on file with the Interstate Commerce Commission and, except as specifically admitted herein, denies each and every allegation set forth and contained in paragraph 4 of the Complaint.

5. Admits that the intrastate rate for the transportation of plaintiff's commodities between New York City and Buffalo, if applicable, which defendant denies, would have been lower than the interstate rates and, except as specifically admitted herein, denies each and every allegation set forth and contained in paragraph 5 of the Complaint.

6. Denies each and every allegation set forth and contained in paragraphs 6 and 7 of the Complaint.

As to the Second Count:

7. Denies having any knowledge or information thereof sufficient to form a belief as to each and every allegation set forth and contained in paragraph 9 of the Complaint.

[fol. 7] 8. Admits that the defendant engages in the transportation of property as a common carrier between points situate within the State of New York and, except as spe-

cifically admitted herein, denies each and every allegation set forth and contained in paragraph 10 of the Complaint.

9. Admits that during the period between January 1, 1953, and February 1, 1955, the defendant received property of the plaintiff for transportation between Buffalo, New York, and New York, New York, and except as specifically admitted herein, denies each and every allegation set forth and contained in paragraph 11 of the Complaint.

10. Admits that defendant's charges for transportation of the plaintiff's property were based on the tariffs filed with the Interstate Commerce Commission and, except as specifically admitted herein, denies each and every allegation set forth and contained in paragraph 13 of the Complaint.

11. Denies each and every allegation set forth and contained in paragraphs 14 and 15 of the Complaint herein.

As a First Separate and Distinct Affirmative Defense:

12. That between January 1, 1953, and February 1, 1955, plaintiff delivered various properties and commodities to the defendant for transportation between Buffalo, New York, and New York, New York.

13. That each and every shipment consisted of and constituted a separate, distinct, independent and entire contract of carriage.

[fol. 8] 14. That each such shipment and each such contract of carriage was made pursuant to and under the uniform domestic straight bill of lading.

15. That the plaintiff failed to file any claim or commence any action upon each and every such separate, distinct, independent and entire contract of carriage within the time limited therefor in each such uniform domestic straight bill of lading covering each such shipment.

As a Second Separate and Distinct
Partial Affirmative Defense:

16. Defendant repeats, reiterates and re-alleges each and every allegation set forth and contained in paragraphs 12,

13, and 14 with the same force and effect as if set forth at length herein.

17. That the plaintiff failed to file any claim or commence any action upon some of the said separate, distinct, independent and entire contracts of carriage within the time limited therefor in each such uniform domestic straight bill of lading.

As a Third Separate, Distinct, and Complete Affirmative Defense:

18. That between January 1, 1953, and February 1, 1955, plaintiff delivered property and commodities to the defendant for transportation between Buffalo, New York, and New York, New York.

19. That at the time of the making of each and every and all of said shipments, it was understood and agreed by and between plaintiff and defendant that each and every and all of said shipments would move via interstate routes and would be charged for in accordance with the tariffs filed with the Interstate Commerce Commission.

[fol. 9] 20. That at the time of the making of each and every and all of said shipments, it was understood and agreed by and between plaintiff and defendant that each such shipment would be transported to, through and by way of the defendant's terminal in New Jersey for the purpose of assembly and/or breakdown and delivery.

21. That at the time of each and every and all of said shipments it was understood and agreed by and between plaintiff and defendant that the defendant could not and would not handle the plaintiff's commodities as intrastate shipments and that it was physically impossible for the defendant to so handle or treat them.

Wherefore the defendant demands judgment against plaintiff dismissing the plaintiff's Complaint with interest, costs and reasonable attorneys' fees.

Goldman and Drazen, By Milton D. Goldman, A Partner, Attorneys for Defendant, Office and P. O. Address, 29 Broadway, New York 6, New York.

[fol. 10]

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION TO DISMISS COMPLAINT—
December 7, 1959

Sir:

Please Take Notice that upon the annexed affidavit of Daniel M. Shientag, duly sworn to December 7th, 1959, and upon the pleadings herein and the proceedings heretofore had herein, the undersigned will move this Court, at Room 506 of the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 28th day of January, 1960, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order under Rules 12-b and 12-c and Rule 56 of the Federal Rules of Civil Procedure, dismissing the plaintiff's complaint and granting judgment to the defendant against the plaintiff on the ground that no justiciable issue is presented upon which any relief may be granted to the plaintiff, and for such other, further and different relief as to the Court may deem just and proper in the circumstances.

Dated New York, N. Y., December 7th, 1959.

Goldman and Drazen, By Jerome Drazen, A Partner,
Attorneys for Defendant.

To: Harry Teichner, Esq., Attorney for Plaintiff.

[fol. 11]

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF DANIEL M. SHIENTAG, READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Daniel M. Shientag, being duly sworn, deposes and says:

1. I am one of the attorneys for the defendant above named and I am fully familiar with the facts and circumstances hereinafter set forth.

2. This affidavit is submitted by me in support of an application by the defendant for an order dismissing the plaintiff's complaint and awarding judgment to the defendant against the plaintiff upon the ground that no justiciable issue is presented by the pleadings herein.

3. The complaint herein contains two counts. The first count alleges that between January 1, 1953, and February 1, 1955, the plaintiff-shipper delivered a series of shipments of foam rubber pads for transportation by the defendant-common carrier from Buffalo, N. Y, to New York City, N. Y. The first count further states that the defendant transported the shipments over an interstate route and charged the plaintiff therefor on the basis of the defendant's filed and published tariffs for such interstate ship-
[fol. 12] ment, whereas the plaintiff alleges said shipments should have been transported over an intrastate route and at the applicable intrastate tariff which was lower than the interstate tariff. The plaintiff further alleges in the said first count that the practice of the defendant in transporting the shipments over the interstate route constituted an unjust and unreasonable practice in violation of Section 216, Part 2, of the Interstate Commerce Act (USCA Title 49, Sec. 316) and that the reasonable rate should not have been in excess of the intrastate rate, and the

reasonable practice should have been to transport the shipments over the intrastate route. Finally, plaintiff states in the first count, that by reason of the defendant's routing practice, it has been subjected to the payment of rates and charges for transportation which were unjust and unreasonable in violation of Section 216, Part 2, of the Interstate Commerce Act, resulting in damages amounting to $10,000.00.

4. In the second count set forth in plaintiff's complaint, it was alleged that if the shipments were transported over the intrastate route, then the defendant did not collect the proper charges in accordance with the tariff filed with the Public Service Commission of the State of New York. This count is not, however, involved herein for the reason that subsequent proceedings before the Interstate Commerce Commission developed the fact that 352 shipments were involved, and of this number, 350 shipments moved over an interstate route from Buffalo over U. S. Highway 20 to Avon, N. Y., thence over U. S. Highway 15 and N. Y. Highway 17 to Waverly, N. Y., and thence over U. S. Highway 309 to Athens, Pa. and N. Y.-N. J. Highway 17 via Binghamton and Middletown, N. Y. and Paramus, N. J. to the defendant's terminal at Jersey City, N. J., and thence to their destinations in New York City. The remaining two shipments moved from Buffalo to Valatie, N. Y. and from [fol. 13] Staten Island to Albany, N. Y. and clearly present no controversy recognizable in this court. They were, firstly, intrastate shipments and, secondly, do not meet any of the jurisdictional requirements of this court.

5. This application is, accordingly, directed to the first count set forth in the complaint and the 350 shipments involved thereunder which moved between Buffalo, N. Y. and New York City, N. Y. between January 1, 1953 and February 1, 1955, and which form the subject matter of the plaintiff's entire complaint herein.

6. In its complaint and with regard to the first count, the plaintiff stated that it desired that the determination of the issues be held in abeyance until a complaint could be filed before the Interstate Commerce Commission al-

leging the facts set forth in the said first count, and requesting that an order be made by the said Interstate Commerce Commission determining the reasonable and just rate for the transportation of the shipments involved.

7. Thereafter and following proceedings instituted before the Interstate Commerce Commission and on October 9, 1957, a report was made by Division 3 of the Interstate Commerce Commission (one of the Commissioners dissenting) holding that routing the shipments over the interstate route was an unreasonable practice and that the defendant should transport such shipments over an intrastate route and that an order should be entered directing defendant to cease and desist in the future from said practice.

8. On the same date, to wit: October 9, 1957, an order was entered as follows:

> "It is Ordered, that the above-named defendant be, and it is hereby, notified and required to cease [fol. 14] and desist, on or before November 27, 1957, and thereafter to abstain, from the violations of the provisions of Section 216 of the Interstate Commerce Act found in the aforesaid report."

9. Thereafter, the defendant commenced an action against the United States of America and the Interstate Commerce Commission in the United States District Court for the District of New Jersey, seeking to set aside the report and order of the Interstate Commerce Commission in the aforesaid proceeding (No. MC-C-1937, *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 302 ICC 173). Said action in the United States District Court for the District of New Jersey is presently pending undecided, and the determination therein is being held in abeyance until the determination of this application.

10. It is submitted that the following facts are not disputed herein:

a) That between January 1, 1953 and about February 1, 1955, 350 shipments were transported by the de-

fendant as a common carrier for the plaintiff as a shipper;

b) That said shipments moved from Buffalo to points in New York City over authorized interstate routes;

c) That the defendant charged and the plaintiff paid the filed and published tariff rates applicable to an interstate shipment over the routes on which the merchandise actually moved.

11. The plaintiff's claim herein arises on its assertion that the charge was unreasonable because there was available, and the defendant should have used, a different route, namely: an intrastate route, which would have resulted in a different and lower rate being charged.

12. On May 18, 1959, the Supreme Court of the United [fol. 15] States decided the cases of *T.I.M.E. Inc.* v. *United States of America* and *Davidson Transfer & Storage Co. Inc.* v. *United States of America.* It is the defendant's contention that said decisions are controlling herein and that their effect is to deny the plaintiff any cause of action or right of recovery for reparations for shipments made prior to the date of the original report of the Interstate Commerce Commission, namely: October 9, 1957, for the reason that no such right exists under common law or Part 2 of the Interstate Commerce Act.

13. Parenthetically, it might be noted that subsequent to the commencement by the defendant, as plaintiff, of the action pending in the United States District Court for the District of New Jersey referred to above, the cease and desist provision of the Interstate Commerce Commission's order of October 9, 1957, was struck out, the defendant having equalized its rates for interstate and intrastate carriage for the articles involved between the terminal points concerned, there then being no occasion or desire for any order with respect to future conduct. Attached hereto and marked Exhibit A are copies of the pleadings herein.

14. The effect of and arguments based upon the decision of the Supreme Court of the United States in the *T.I.M.E.*

and *Davidson* cases will be set forth in a memorandum of law being submitted to the Court concurrently herewith.

Wherefore, it is respectfully requested that an order be made and entered herein granting the defendant a judgment dismissing the plaintiff's complaint, and for such other, further and different relief as may seem just and proper to the Court in the circumstances.

Daniel M. Shientag.

(Sworn to on the 7th day of December, 1959.)

[fol. 16]

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HARRY TEICHNER, READ IN OPPOSITION TO MOTION

State of New York,
County of Kings, ss.:

Harry Teichner, being duly sworn, deposes and says:

1. I am the attorney for the plaintiff herein, and I am familiar with the facts and circumstances hereinafter set forth.

2. This affidavit is made by me in opposition to the defendant's motion to dismiss the complaint and for judgment for such dismissal on the alleged ground that no justiciable issue is presented by the pleadings herein.

3. Page 4 of the moving affidavit states that the motion is directed to only the first count of the complaint. Stripped of its allegations of conclusions of law, the first count of the complaint alleges in substance the following facts. Between January 1, 1953 and February 1, 1955 the plaintiff shipper delivered a number of shipments of foam rubber pads to the defendant common carrier for transportation by motor vehicle from Buffalo, N. Y. to New

York City, N. Y. The defendant transported the shipments over an interstate route and charged the plaintiff [fol. 17] therefor on the basis of the defendant's published tariffs, filed with the Interstate Commerce Commission. However, the defendant contemporaneously published tariffs, filed with the Public Service Commission of the State of New York, containing rates for the intrastate transportation of said shipments, which rates were lower than the aforesaid interstate rates. The freight charges based upon the interstate rates exceeded those that would have accrued upon the basis of the intrastate rates by the sum of $10,000.00, and plaintiff demands judgment therefor. The complaint asks that the determination of the issues in this action be held in abeyance until the decision by the Interstate Commerce Commission upon a complaint to be filed by the plaintiff.

4. A complaint was filed by the plaintiff with the Interstate Commerce Commission setting forth those facts and requesting relief. Thereafter and on October 9, 1957 a report was made by Division 3 of the Interstate Commerce Commission, wherein the Commission made a finding that the cheaper intrastate route should have been used by the defendant in transporting the aforesaid shipments, which had been tendered unrouted to the defendant. The Commission's report appears in 302 I.C.C. Reports 173, and is made a part of this affidavit by reference.

5. Thereafter, the defendant commenced an action against the United States of America and the Interstate Commerce Commission in the United States District Court for the District of New Jersey, seeking to set aside the report and order of the Interstate Commerce Commission in the aforesaid proceeding. The plaintiff herein was not made a party to that suit, which has been tried but is still pending undetermined. After the trial thereof, and on May 18, 1959, the Supreme Court of the United States decided the cases of *T.I.M.E. Inc.* v. *United States of America* and *Davidson Transfer & Storage Co. Inc.* v. *United* [fol. 18] *States of America*, 359 U. S. 464. Thereupon, the defendant herein urged in the New Jersey action, that the

Supreme Court decision was decisive of the action pending in the District Court of New Jersey and that the aforesaid report and order of the Commission should be annulled. General Counsel for the Interstate Commerce Commission, representing the Commission in the New Jersey suit, wrote a supplemental memorandum in the form of a letter to Judge Richard Hartshorne, before whom that case is pending, expressing the views of the Interstate Commerce Commission, that the Supreme Court's aforesaid decision is not controlling in the New Jersey action, nor is it controlling in the instant action in this Court. A copy of said letter, dated July 31, 1959, is annexed hereto and made a part hereof, and is marked "Exhibit 1".

6. The defendant herein is contending on this motion that the aforesaid decision of the Supreme Court is authority for denying the plaintiff herein the relief it seeks. It appears that Judge Hartshorne is holding in abeyance his decision in the New Jersey suit, pending the determination of the instant motion in this Court.

7. A memorandum of law is being submitted to the Court herewith in support of plaintiff's complaint and in opposition to defendant's motion.

8. It is respectfully submitted that the facts in this case are sufficient to constitute a cause of action upon which the plaintiff is entitled to relief.

Wherefore, plaintiff respectfully requests that the motion be denied, and that plaintiff have such other, further and different relief as may be just and proper.

Harry Teichner.

(Sworn to the 23rd day of February, 1960.)

[fol. 19]

EXHIBIT 1 ANNEXED TO FOREGOING AFFIDAVIT

BFT:BAL

INTERSTATE COMMERCE COMMISSION
Office of the General Counsel
WASHINGTON 25, D. C.

July 31, 1959

Honorable Richard Hartshorne
United States District Court
Newark 1, New Jersey

Re: *Eastern Freight-Ways, Inc.* v. *United States and Interstate Commerce Commission*, C. A. No. 535-58 (G. C. File No. 1517).

Dear Judge Hartshorne:

The purpose of this letter is to express the views of the Interstate Commerce Commission respecting the effect of *T.I.M.E. Inc.* v. *U. S.* and *Davidson Transfer & Storage Company, Inc.* v. *U. S.*, Supreme Court Nos. 68 and 96, decided May 18, 1959, on the above-entitled case. As you have been advised by the Department of Justice, the United States decided against petitioning for rehearing in the *T.I.M.E.* and *Davidson* cases.

In both the *T.I.M.E.* and *Davidson* cases, the motor carriers had refunded under protest the differences between amounts which they had charged the United States as shipper and amounts which the General Accounting Office deemed proper. The motor carriers sued in federal district courts under the Tucker Act (28 U.S.C. § 1346(a)(2)) to recover the refunds. The district courts entered summary judgments in favor of the motor carriers and the United States appealed. On appeal, it was conceded that the rates charged were the applicable rates embodied in tariffs on file with the Commission, but the United [fol. 20] States contended that the rates were unreasonable

and that the issue of reasonableness should be referred to the Commission for determination. The courts of appeals reversed the decisions below with directions that the cases be held in abeyance pending determination by the Commission of the reasonableness of the applicable rates. Upon application by the motor carriers, the Supreme Court granted certiorari.

As stated by the Supreme Court, these cases present in common a single question, namely, "Can a shipper of goods by a certificated motor carrier challenge in post shipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?" There was no question of misrouting in the *T.I.M.E.* and *Davidson* cases. At issue was simply whether there exists a judicially cognizable right of a shipper by motor vehicle to recover on the ground that the legally applicable rate was intrinsically unreasonable, or to interpose such rate unreasonableness in defense of a suit by the carrier to recover the legally applicable rate. In a 5 to 4 decision, the Court answered the above question in the negative, concluding that the Motor Carrier Act itself does not give shippers a cause of action for recovery of allegedly unreasonable past rates, or enable them to assert rate unreasonableness as a defense in carrier suits to recover applicable tariff rates, and that any such common law right did not survive the passage of the Motor Carrier Act.

The suit in the Southern District of New York, in aid of which the Commission made the determination which is before your Honor, was brought by the shipper to recover the difference between the tariff rate over the interstate routes used and the lower tariff rate published to apply over intrastate routes with respect to those unrouted shipments between points in the same state. It is the shipper's contention that the carrier subjected it [fol. 21] to wrongful charges by transporting the shipments at issue over more expensive interstate routes in derogation of the carrier's duty to transport the unrouted shipments over the less expensive intrastate routes in the absence of adequate justification for failure to do so. *Northern*

Pacific Railroad Co. v. Solum, 247 U. S. 477. Thus, the claim is not that the rate charged was intrinsically unreasonable, rather the controversy is over which of two rates, each embodied in published tariffs of the carrier, should have been charged. The *T.P.M.E.* and *Davidson* cases do not purport to deal with the present situation.

Obviously, once a carrier takes possession of a shipment, the shipper has no way to guard against a carrier misrouting his shipment. It would be contrary to all sense of fair play to hold that a shipper is so at the mercy of a carrier that the latter may collect and retain the rate over whatever route it chooses to transport even though it violates its duty to select the cheapest route available to it. Consequently, the courts have recognized the right of shippers to protection from misrouting by the transporting carrier. For example, in *Wooleyan Transportation Co.* v. *George Rutledge Co.*, 162 F. 2d 1016 (3d Cir. 1947), the carrier quoted the shipper an intrastate rate for transporting goods between two points in New Jersey. The carrier, however, moved the goods via its interstate route and demanded payment on the basis of its higher interstate route, contending that it was required by the Interstate Commerce Act to observe its interstate rate by the route of movement. In denying recovery by the carrier the Court of Appeals said:

> "• • • The contract between the parties was for intrastate carriage of the goods by motor truck between Montclair and Fedricktown, • • • Instead, for its own convenience and because of certain union contracts with its truck drivers, it transported the goods [fol. 22] over a longer interstate route, via Wilmington, Delaware. By such unilateral action, however, it could not convert a lawful contract for intrastate carriage into one for interstate carriage so as to impose upon the defendant shipper liability for a rate higher than it had agreed to pay.
>
> • • • Here, however, the plaintiff, with the obvious direct intrastate route open to it, took the defendant's goods around Robin Hood's barn in getting them from Montclair to Fedricktown."

Cf., *Galveston H. & S. A. Ry. Co. v. Lobit Bros.*, 294 Fed. 968, 971-973 (S. D. Texas, 1923); *Miller v. Davis Director General of Railroads*, 240 N. W. 743 (Sup. Ct., Iowa, 1932).

While the Commission lacks power to award damages to a shipper by motor carrier, it is abundantly clear that where an administrative question is involved in an action cognizable in court, that issue must be determined by the appropriate administrative agency. Cf., *United States v. Western Pacific R. Co.*, 352 U. S. 59. Whether the existing circumstances justified the carrier in transporting the shipments at issue via the interstate routes instead of the less expensive intrastate routes was properly a matter for initial determination by the Commission. *Northern Pacific Railway Co. v. Solum, supra.*

It is apparent that if the suit filed in the Southern District of New York is maintainable, it was necessary and proper that the Commission make the determination it did in order that the suit might proceed to decision. As I have indicated, the *T.I.M.E.* and *Davidson* cases do not require the conclusion that a suit to recover for misrouting is not judicially cognizable. I suggest that, in any event, the question of whether the action in the District Court for the Southern District of New York is judicially cognizable should properly be left to that court.

[fol. 23] It is our view that your Honor may appropriately proceed to decision in the present case on the issues raised by the parties.

Copies of this letter are being sent to all counsel of record.

Very truly yours,

B. FRANKLIN TAYLOR, JR.,
Associate General Counsel.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HEWITT ROBINS INC., Plaintiff,

—against—

EASTERN FREIGHT-WAYS, INC., Defendant.

OPINION OF THE COURT—October 4, 1960

BICKS, *District Judge.*

Defendant, a New Jersey Corporation, is a common carrier by motor vehicle possessed of operating rights over both intra and interstate routes governed respectively by tariffs filed with the New York Public Service Commission, (hereinafter PSC), and the Interstate Commerce Commission, (hereinafter ICC). From January 1, 1953 to February 1, 1955, plaintiff, a New York Corporation, tendered a number of unrouted shipments to defendant for carriage between Buffalo, New York and New York City. A number of these shipments were carried over interstate routes necessitating the application of the ICC tariffs [fol. 24] rather than the PSC tariffs which would have been applicable had the shipments been wholly intrastate. Alleging that said routing practice was unreasonable, plaintiff commenced this action, premised on Section 216, Part II of the Interstate Commerce Act, 49 U. S. C. A. § 316, to recover the difference between the amount charged as a result of the interstate shipment and that which would have been charged had the shipments been intrastate.

The motion *sub judice* is to dismiss the complaint and grant judgment for the defendant, in that no justiciable issue is here presented upon which relief may be granted. This case presents a single question under the Motor Carrier Act: Can a shipper of goods by motor carrier challenge in post-shipment litigation the unreasonableness of a carrier's practices in selecting inter or intrastate routes for unrouted shipments, and recover reparations if found unreasonable?

As is the case when the reasonableness of rates is attacked, *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1906), so here, the ICC has primary jurisdiction to determine the unreasonableness of a routing practice and courts are without authority to make such determination, *Northern Pacific Ry. Co.* v. *United States*, 247 U. S. 477, 483 (1917); *Ontario Freight Lines Corp.* v. *United States*, 76 F. Supp. 526 (D. N. J. 1948).* Plain-
[fol. 25] tiff apparently realized this since, during the pendency of this action, it initiated proceedings before the ICC to determine the question of reasonableness. The ICC made a determination that the routing practice herein was unreasonable and forbid defendant from pursuing it prospectively. An appeal from this decision is pending in the United States District Court for the District of New Jersey.

The contention by plaintiff that the Motor Carrier Act creates a statutory cause of action with respect to reparations for unreasonable routing practices is without merit. *T.I.M.E. Inc.* v. *United States*, 359 U. S. 464 (1958). And, though at common law "in the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route * * * 'if other conditions are reasonably equal'." *Northern Pacific Ry. Co.* v. *Solum*, *supra*, at 482, the savings clause of the Act, 49 U. S. C. A. § 316(j), does not preserve the right of action arising from a breach of that duty, since the issue of reasonableness is referable to the Commission. *T.I.M.E. Inc.* v. *United States*, *supra*, at 474, et seq. See also, *Riss & Co.* v. *Association of American Railroads*, 178 F. Supp. 438, 444-445 (D. C. 1959).

Motion granted. Settle order on notice.

Dated: October 4, 1960.

Alexander Bicks, United States District Judge.

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* * * * * the rule which requires such preliminary determination of administrative question by the Commission applies to * * * any practice of the carrier which gives rise to the application of a rate.

The fact that the administrative question presented involves an intrastate as well as interstate route does not prevent the application of the rule, that courts may not be resorted to until the administrative question has been determined by the Commission. It is sufficient if one of the routes is interstate." *Northern Pacific Ry. Co.* v. *Solum*, *supra*, at 483.

[fol. 26]

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

Civil Case No. 107-319

HEWITT-ROBINS INCORPORATED, Plaintiff,

—against—

EASTERN FREIGHT-WAYS, INC., Defendant.

ORDER AND JUDGMENT APPEALED FROM—October 19, 1960

The defendant having moved for an order, pursuant to Rules 12-b and 12-c and Rule 56 of the Federal Rules of Civil Procedure, dismissing the plaintiff's complaint and granting judgment to the defendant against the plaintiff on the ground that no justiciable issue is presented upon which any relief may be granted to the plaintiff, and for such other, further and different relief as the Court may deem just and proper in the circumstances, and said motion having duly come on to be heard before me on the 25th day of February, 1960, and Goldman & Drazen, Esqs., by Daniel M. Shientag, Esq., having appeared in support of the motion for summary judgment, and Harry Teichner, Esq., having appeared in opposition thereto,

Now, on reading and filing the opinion of this Court and the pleadings herein and the defendant's notice of motion dated December 7th, 1959 and the affidavit of Daniel M. Shientag, duly sworn to on the 7th day of December, 1959, submitted in support of defendant's aforesaid motion, and after reading and filing the affidavit of Harry Teichner, Esq., duly sworn to on the 23rd day of February, 1960, together with the exhibit attached thereto, in opposition to the aforesaid motion and due deliberation having been had thereon,

[fol. 27] Now, on reading and filing the opinion of the Court, duly filed on October 5th, 1960, it is on motion of Goldman & Drazen, attorneys for the defendant,

Ordered, that the defendant's motion dismissing the plaintiff's complaint and granting judgment to the defendant pursuant to Rules 12-b and 12-c and Rule 56 of the Federal Rules of Civil Procedure be and the same hereby is granted and the complaint is dismissed.

Dated: Oct. 18, 1960.

Judgment entered 10-19-60.

Herbert A. Charlson, Clerk.

Alexander Bicks, U. S. D. J.

J.A.M. Rec'd in Clerk's Office 10-19-60.

The plaintiff, by its attorney, Harry Teichner, Esq., 66 Court Street, Brooklyn N. Y., hereby waives notice of settlement of the above order.

Harry Teichner, Attorney for Plaintiff.

[fol. 28]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 268—October Term, 1960.

(Argued February 28, 1961)

Docket No. 26685

HEWITT-ROBINS INCORPORATED, Plaintiff-Appellant,

—against—

EASTERN FREIGHT-WAYS, INC., Defendant-Appellee.

OPINION—July 25, 1961

Before: Hincks and Moore, Circuit Judges, and Brennan, District Judge.*

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* Sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York, Alexander Bicks, *Judge*, and judgment entered thereon, dismissing appellant's complaint pursuant to Rules 12-b, 12-c and Rule 56 of the Federal Rules of Civil Procedure, 187 F. S. 722. *Affirmed.*

[fol. 29] Harry Teichner, Brooklyn 1, New York, for plaintiff-appellant.

Goldman & Drazen, New York, New York (Milton D. Goldman and Wilfred R. Caron on the brief), for defendant-appellee.

BRENNAN, *District Judge*:

The question involved in this litigation requires the application of the provisions of the Interstate Commerce Act (49 U. S. C. 301-327), sometimes known as the Motor Carrier Act, to the facts disclosed in the complaint. The Court below held the complaint to be insufficient under Rules 12-b, 12-c and 56 F. R. C. P. to present a justiciable issue. A brief statement of facts is set out below.

During the period from January 1953 to February 1955, the appellant delivered to the appellee at Buffalo and New York City numerous unrouted shipments of cartons containing foam rubber pads for transportation between the two above cities. The service was performed by the appellee over an interstate route. The freight charges, in accordance with the filed tariff for such route, were paid by appellant who seeks to recover some $10,000 which represents the excess of said charges over those applicable to an alternate intrastate route.

The appellee, hereinafter referred to as "Eastern," is a certified common carrier by motor vehicle, possessing operating rights between Buffalo and New York City over both interstate and intrastate routes. The applicable rates for the interstate movement were somewhat higher than the rates for the intrastate movement as fixed in the tariffs filed with the Interstate Commerce Commission and the Public Service Commission of the State of New York.

[fol. 30] The complaint alleges specifically that the action "arises under Part II of the Interstate Commerce Act, U. S. Code, Title 49, Sections 301 to 327." It is further alleged therein that the " * * * rates charged * * * and the practice of the defendant in misrouting the shipments * * * were unjust and unreasonable in violation of Section 216, Part II, of the Interstate Commerce Act. (U. S. Code, Title 49, Section 316)." Other allegations are found in the complaint asserting the unreasonableness of the rates charged, all of which are put in issue by the answer. The appellant recognizes the jurisdiction of the Interstate Commerce Commission in the matters referred to in the above allegations. The complaint requests a stay of the determination of the issues involved until the Interstate Commerce Commission could determine "the reasonable and just rates for the transportation of the aforesaid shipments" in a proceeding to be instituted by appellant upon the commencement of the action. It may be stated that such a proceeding was taken and an administrative determination was made holding that Eastern's routing practice, as indicated above, was unreasonable. A cease and desist order to operate prospectively was entered. Such determination is challenged by Eastern in an action to review same. The action is pending in the United States District Court for the District of New Jersey.

Subsequent to the commencement of this action, the Supreme Court handed down the decision reported as *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464. The lower court relied upon that decision in holding that the complaint, insofar as it is based upon the statute, does not state a claim upon which relief may be granted. The appellant's argument that this action may be distinguished from the holding in the *T. I. M. E.* case, because the later decision involved rates which were intrinsically unreasonable while [fol. 31] here the rates are unreasonable by reason of misrouting, is not persuasive. Under Part I of the Interstate Commerce Act, 49 U. S. C. A., § 1, *et seq.*, "Whether the practice of the carrier of shipping over the interstate route was reasonable, when a lower intrastate route was open to it, presents an administrative question. * * *" *North Ca*

Pacific Ry. Co. v. *Solum*, 247 U. S. 477, 482-483.[1] The same practice when arising under the Motor Carrier Act §§201, *et seq.*, Part II of Interstate Commerce Act, 49 U. S. C. A. §§301, *et seq.*,[2] must necessarily be an administrative question. For there is no significant difference of language between the applicable sections of Part I of the Interstate Commerce Act and of the Motor Carrier Act. It follows that the rationale of the *T. I. M. E.* case, pages 472, *et seq.*, is directly applicable here: if, as *T. I. M. E.* holds, under the saving clause of §216(j) of the Motor Carrier Act, 49 U. S. C. A. §316(j), no common law remedy is saved to a [fol. 32] shipper aggrieved by an unreasonable rate, which was an administrative question, no such remedy is saved to a shipper aggrieved by the application of an unreasonable route, which was also an administrative question as held in *Northern Pacific Ry. Co.* v. *Solum*, *supra*.

Affirmed.

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[1] Part 1 of the Interstate Commerce Act, 49 U. S. C. A. §1(5), with respect to carriers by rail provides that "all charges * * * shall be just and reasonable, and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful." 49 U. S. C. A. §1(6) provides that "every unjust and unreasonable * * * practice is prohibited and declared to be unlawful." 49 U. S. C. A. §15(1) provides that whenever "* * * the Commission * * * shall be of opinion * * * that any individual or joint * * * practice whatsoever * * * is or will be unjust or unreasonable * * * the Commission is authorized and empowered to determine * * * what individual * * * practice is or will be just, fair, and reasonable."

[2] Similarly, the Motor Carrier Act §§216(b) and (d), 49 U. S. C. A. §§316(b) and (d), provides that it "shall be the duty of every common carrier of property by motor vehicle * * * to establish * * * just and reasonable rates * * * and practices * * * *" and that all such charges "shall be just and reasonable and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful." And §216(e) of the Motor Carrier Act, 49 U. S. C. A. §316(e), provides that whenever "the Commission shall be of the opinion that any individual * * * rate * * * or practice * * * is or will be unjust and unreasonable * * * it shall determine * * * the lawful rate * * * or the lawful * * * practice."

MOORE, *Circuit Judge* (dissenting):

The merits of the only question now before the court to me seem so clear that it is difficult to conceive of any ground for disagreement. The question is: should plaintiff (appellant) be deprived of an opportunity to place its case before a trial court upon all the facts or, stated in different form, should the doors of the court house be permanently closed to it after a perusal of the pleadings. The doors have been closed by the district court; the majority here now securely bolts them. The only real issue which the complaint submits for determination is the misrouting of plaintiff's shipments. The majority, as did the District Court, bases its decision upon a recent opinion by the Supreme Court in *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464 (1959) wherein that court, in a five-to-four decision held that a shipper of goods by motor carrier in post shipment litigation cannot challenge the reasonableness of the carrier's charges which had been made in accordance with filed tariffs governing the shipment.

Unlike the *T. I. M. E.* case, no issue of reasonableness of rates is here presented—in fact, the rates filed are not challenged. The gravamen of the complaint is that defendant carried the goods over the wrong route for which error it should not be charged.

Plaintiff has obtained a ruling from the Commission in an administrative proceeding that the practice was un[fol. 33] reasonable. However, merely because the word "unreasonable" appears in the *T. I. M. E.* opinion, wherein a recovery for unreasonable rates was denied, does not make it logical to place the decision here upon the reasoning that *T. I. M. E.* held that no common law remedy was saved to a shipper aggrieved by an unreasonable rate, that the determination of "unreasonable rate" was an administrative question; and, therefore, because misrouting was unreasonable and so determined in an administrative proceeding, no common-law remedy was available or preserved by the exceptive provisions of the statute (Section 216(j), 49 U. S. C. 316(j): "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."). In my opinion, this is specious syl-

logistic reasoning wherein parallelism is sought to be created by looking only at the words "unreasonable" and "administrative" without analyzing the real basis underlying the result in the *T. I. M. E.* case. The opinions therein of Mr. Justice Harlan for the majority and Mr. Justice Black for the minority four members of the court trace the legislative history carefully and exhaustively. Their respective views are stated with great clarity and, although differing in result on the specific facts with which they were dealing, even the majority opinion does not preclude a decision that on the facts here presented plaintiff would not have a right to be heard in a federal court.

As the Supreme Court pointed out, "the Motor Carrier Act apparently sought to strike a balance between the interests of the shipper and those of the carrier, and * * * the statute cut significantly into pre-existing rights of the carrier to set his own rates and put them into immediate effect * * *." Thus "[u]nder the Act a trucker can raise its rates only on 30 days' prior notice, and the I. C. C. may, on its own initiative or on complaint, suspend the effective-[fol. 34] ness of the proposed rate for an additional seven months while its reasonableness is scrutinized." (*T. I. M. E.*, pp. 479-480.) And as the *T. I. M. E.* decision further notes, this seven-month suspension period is usually ample to permit the adjudication of the rate's reasonableness. The issue in *T. I. M. E.*, therefore, was whether the shipper could recover in a common law action an asserted unreasonable charge when the rate had been previously filed with the Commission after notice to all concerned and had been approved by the Commission to the extent of permitting it to prevail when it could have been suspended. Congress having provided the shipper with such a built-in protection, it was not unreasonable to assume that the shipper's common law right to recover on the theory that the filed rate was unreasonable was implicitly extinguished by the Act. In fact, to allow such a remedy to stand would be inconsistent with and undercut the anticipatory procedures provided.

The situation is vastly different here. As to unreasonable routing practice, no built-in protection for the shipper has been provided. Nor does a shipper have notice that

it will be routed around Robin Hood's Barn until after this has actually occurred. In effect the shipper is in a position similar to that of a shipper who has been charged a rate in excess of the filed tariff. In such a situation even the legislative history referred to in *T. I. M. E.* indicates that such overcharges can still be recovered in a court proceeding.[1] That decision also suggests a distinction both pertinent and applicable here. The shipper in *T. I. M. E.* was relying on certain legislative history to support its view that there existed a common law remedy for [fol. 35]

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[1] *T. I. M. E.*, footnote 18, pp. 477-478, reads in part:

"It is suggested that Congress was fully informed at the time of passage of the Transportation Act of 1940 of 'an existing interpretation' of the Motor Carrier Act which would allow common-law actions for the recovery of unreasonable rates. We do not so read the legislative history relied upon. On the contrary, Commissioner Eastman, testifying before the Senate Committee, appeared to distinguish between the availability of a judicial remedy in respect of inapplicable tariff rates and the unavailability of such a remedy in respect of rates claimed to be 'unreasonable' though embodied in a filed tariff. The Commissioner said:

"'So far as reparation is concerned, there is no reason why these provisions should not be applied to motor carriers as well as to railroads. They were omitted from the Motor Carrier Act only because of the desire to lighten the burdens of the motor carriers in the early stages of regulation, in the absence of any strong indication of public need. Motor carriers have practically no traffic which is noncompetitive, and there is little danger that they will exact exorbitant charges. Since the Motor Carrier Act became effective in 1935, the Commission has not once had occasion to condemn motor-carrier rates as unreasonably high. I don't think we have had any complaints to that effect. It follows that there is nothing to indicate that shippers need provisions to enable the Commission to award reparation for damages suffered because of unreasonable charges.

"'The occasion for reparation from motor carriers would chiefly arise, therefore, in the event of overcharges above published tariff rates. Shippers can recover *such overcharges* in court as the law now stands.' (Emphasis added.)

"Hearings before Senate Interstate Commerce Committee on S. 1310, S. 2016, S. 1869, and S. 2009, 76th Cong., 1st Sess., pp. 791-792."

the recovery of unreasonable rates. In reading this history contrary to the shipper's view, the Court noted Commissioner Eastman's testimony as distinguishing "between the availability of a judicial remedy in respect of inapplicable tariff rates and the unavailability of such a remedy in respect of rates claimed to be 'unreasonable' though embodied in a filed tariff." The former situation seems clearly applicable to this case, since it is claimed by plaintiff, not that the tariff rate itself is unreasonable, but that the application of this rate to the particular shipment was unreasonable.

[fol. 36] The Supreme Court "has frequently had occasion to say that interpretations of statutes by agencies charged with their administration are entitled to very great weight." *Fawcus Machine Co. v. United States*, 282 U. S. 375, 378 (1931); *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944). Although it does not reach the status of an agency interpretation, the analysis of the situation now before this court made by the Interstate Commerce Commission, Office of the General Counsel, with respect to the effect of the *T. I. M. E.* case on this case is so accurate that it is entitled, in my opinion, both to respect and to weight.

> "Thus, the claim [in the instant case] is not that the rate charged was intrinsically unreasonable, rather the controversy is over which of two rates, each embodied in published tariffs of the carrier, should have been charged. The *T. I. M. E.* and *Davidson* cases do not purport to deal with the present situation.
>
> "Obviously, once a carrier takes possession of a shipment, the shipper has no way to guard against a carrier misrouting his shipment. It would be contrary to all sense of fair play to hold that a shipper is so at the mercy of a carrier that the latter may collect and retain the rate over whatever route it chooses to transport even though it violates its duty to select the cheapest route available to it. Consequently, the courts have recognized the right of shippers to protection from misrouting by the transporting carrier. For example, in *Woolegan Transportation Co. v. George Rutledge Co.*, 162 F. 2d 1016 (3rd Cir. 1947), the carrier quoted

the shipper an intrastate rate for transporting goods between two points in New Jersey. The carrier, however, moved the goods via its interstate route and demanded payment on the basis of its higher interstate route, contending that it was required by the [fol. 37] Interstate Commerce Act to observe its interstate rate by the route of movement. In denying recovery by the carrier the Court of Appeals said:

"* * * The contract between the parties was for intrastate carriage of the goods by motor truck between Montclair and Pedricktown, * * * Instead, for its own convenience and because of certain union contracts with its truck drivers, it transported the goods over a longer interstate route, via Wilmington, Delaware. By such unilateral action, however, it could not convert a lawful contract for intrastate carriage into one for interstate carriage so as to impose upon the defendant shipper liability for a rate higher than it had agreed to pay."

"* * * Here, however, the plaintiff, with the obvious direct intrastate route open to it, took the defendant's goods around Robin Hood's barn in getting them from Montclair to Pedricktown."

Counsel concludes (as do I) that:

"As I have indicated, the *T. I. M. E.* and *Davidson* cases do not require the conclusion that a suit to recover for misrouting is not judicially cognizable."

As Mr. Justice Black pointed out in his dissent in *T. I. M. E.*:

"There can be no serious doubt that at common law a cause of action existed against carriers who charged unreasonable rates. See *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 383. Nor can it be questioned that the Motor Carrier Act confirmed the common-law policy against unreason- [fol. 38] able rates and in fact expressly made such

rates illegal.[2] It is also clear that the Act attempted to preserve all pre-existing remedies which did not directly conflict with its aims."

There may be sufficient reasons for denying redress in the courts to shippers for claims that filed rates are unreasonable but it by no means follows that shippers should be deprived of access to the courts for all wrongful acts committed by motor carriers, for example, mishandling, erroneous billing, misrouting, etc.

Such a determination would not prejudice the carrier's defenses such as agreement to the interstate route, payment of the charges with knowledge, acquiescence, estopped, laches, etc., any or all of which may well defeat plaintiff's claim but at least plaintiff would thus have a determination on the merits and not be left without remedy merely because its complaint mentioned a statutory basis for its asserted claim.

I would reverse.

[fol. 39]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HEWITT-ROBBINS INCORPORATED, Plaintiff-Appellant,

v.

EASTERN FREIGHT-WAYS, INC., Defendant-Appellee.

JUDGMENT—July 25, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the Order and Judgment of said District Court be and it hereby is Affirmed.

A. Daniel Fusaro, Clerk.

[fol. 39a] [File endorsement omitted]

[fol. 40] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 41]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 491

HEWITT-ROBINS INCORPORATED,

Petitioner,

—v.—

EASTERN FREIGHT-WAYS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY TEICHNER,
66 Court Street,
Brooklyn 1, New York.
Attorney for Petitioner.

THE ALPERT PRESS, INC. — TRIANGLE 5-1058-1059

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IN THE

Supreme Court of the United States

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Petitioner,

—v.—

EASTERN FREIGHT-WAYS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Peitioner, Hewitt-Robins Incorporated, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on July 25, 1961.

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported in 187 F. Supp. 722, and is also printed in the record submitted to the Court below at pages 24a-26a.

The majority opinion of the Court of Appeals and the dissenting opinion of Judge Moore (*infra*, Appendix A, pp. 12-22) are not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 25, 1961 (*infra*, Appendix B, p. 23). The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Question Presented

Whether the common law action for damages sustained by a shipper by reason of motor carrier misrouting of a shipment of goods has survived the enactment of the Motor Carrier Act §§201, *et seq.*, Part II of the Interstate Commerce, 49 U. S. C. §§301-327.

Statute Involved

The chief statute involved is the Motor Carrier Act §§201, *et seq.*, Part II of the Interstate Commerce Act, 49 U. S. C. §§301-327, the pertinent portion of which is Section 216 (j) of the Motor Carrier Act [49 U. S. C. §316 (j)] providing as follows:

> "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

Statement

This is an action by petitioner, a shipper of goods, against respondent, a common carrier by motor vehicle, to recover damages sustained by petitioner by reason of respondent's misrouting of numerous shipments of the petitioner.

Between January 1, 1953 and February 1, 1955, the petitioner delivered numerous shipments of foam rubber pads to the respondent, a common carrier by motor vehicle, for transportation from Buffalo, N. Y., to New York City, N. Y. The respondent possessed operating rights over an

interstate route between those points, as well as an intrastate route. The applicable rates for the interstate movement, as published in tariffs on file with the Interstate Commerce Commission, were higher than the applicable rates for the intrastate movement, as published in tariffs on file with the Public Service Commission of New York. These shipments were tendered unrouted by the petitioner.

In the first count of the complaint herein (R. 2a) the petitioner alleges that the respondent transported said shipments over its higher-rated interstate route, and that by reason thereof the respondent charged and collected from the petitioner the sum of $10,000.00 in excess of the charges that would have accrued if the respondent had moved the shipments over the less expensive intrastate route. The petitioner demands judgment in that amount.

The first count of the complaint (R. 2a) alleges the conclusion of law that the respondent's conduct was an unreasonable practice in violation of the Interstate Commerce Act. It is also requested therein that the proceedings in this action be held in abeyance pending the filing of a complaint by the petitioner with the Interstate Commerce Commission for an order "determining the reasonable and just rates for the transportation of the aforesaid shipments".

Proceedings thereafter instituted by petitioner before the Interstate Commerce Commission resulted in a report made by the Commission, in which a finding was made that the lower-rated route should have been used by respondent in transporting said shipments. The Commission also found that the practice of respondent in using its higher-rated interstate route was an unreasonable practice. The report is published in *Hewitt-Robins, Incorporated* v. *Eastern Freight-Ways, Inc.*, 302 I. C. C. Reports 173.

Respondent, being dissatisfied with the Commission's decision, commenced an action against the United States of America and the Interstate Commerce Commission in the

United States District Court for the District of New Jersey, to set aside the report and order of the Commission made in said proceedings. Petitioner was not made a party to that action. The case was tried before Judge Richard Hartshorne in the United States District Court for the District of New Jersey, but no decision has been made therein, and such decision is being held in abeyance pending the determination of the instant petition and the appeal in the event the instant petition is granted.

Subsequent to the commencement of this action and after the trial of the New Jersey action, the Supreme Court of the United States handed down the decision reported as *T. I. M. E. Inc.* v. *United States of America*, 359 U. S. 464. Respondent urged in the Courts below that this decision requires a dismissal of the complaint herein. District Judge Alexander Bicks in an opinion (R. 24a), reported in 187 F. Supp. 722, agreed with respondent's contention, held that the savings clause of the Interstate Commerce Act, 49 U. S. C. § 316(j) did not preserve the common law remedy of a shipper against a motor carrier to recover damages for misrouting, and made an order dismissing the complaint (R. 27a) on the ground that no justiciable issue is presented upon which any relief may be granted to petitioner.

Upon appeal from the District Court's dismissal of the complaint, the Court of Appeals affirmed (*infra*, Appendix A, pp. 12-22), one Judge dissenting (*infra*, Appendix A, pp. 16-22). The opinions are not yet reported.

Basis Of Federal Jurisdiction

Federal jurisdiction in the court of first instance is based upon the diversity of citizenship of the parties.

Reasons For Granting The Writ

The pronouncement of the Courts below that a suit by a shipper against a motor carrier to recover damages for

misrouting is not judicially cognizable is in conflict with the decisions in this Court and in other courts of appeal.

Under the common law where a carrier maintains different rates on the same traffic over two open routes between the same points, and the freight rate over one route is less than such rate over the other route, if other conditions are reasonably equal, it is the duty of the carrier to transport the shipments between those points over the line which will give the shipper the benefit of the cheaper rate. *Northern Pacific Railway Co.* v. *Solum*, 247 U. S. 477, 482.

The decision sought to be reviewed is irreconcilable with that of the Third Circuit in *Woolegan Transportation Co.* v. *George Rutledge Co.*, 162 F. 2d 1016 (1947). In that case the motor carrier quoted the shipper an intrastate rate for transporting goods between two points in New Jersey. The carrier, however, moved the goods via its interstate route and demanded payment on the basis of its higher interstate route, contending that it was required by the Interstate Commerce Act to observe its interstate rate by the route of movement. In denying recovery by the carrier the Court of Appeals said:

> "* * * The contract between the parties was for intrastate carriage of the goods by motor truck between Montclair and Fredericktown, * * *. Instead, for its own convenience and because of certain union contracts with its truck drivers, it transported the goods over a longer interstate route, via Wilmington, Delaware. By such unilateral action, however, it could not convert a lawful contract for intrastate carriage into one for interstate carriage so as to impose upon the defendant shipper liability for a rate higher than it had agreed to pay."

It seems clear that a delivery of a shipment to a carrier and acceptance by it without routing instructions, has the effect of writing into the contract of carriage a covenant to

the effect that the carrier shall select the cheapest available route, all conditions being equal.

In *S. W. Shattuck Chemical Co.* v. *T. & M. Transp. Co.*, 134 F. 2d 394, C. C. A. Tenth Circuit (1943), it was held that in an action by an interstate motor carrier to recover under-charges of freight by reason of shipment over a route selected by the carrier, it was error to strike the shipper's answer and cross-petition alleging that there were other available routes over which rates did not exceed the amount paid and one of such routes should have been used.

In a subsequent appeal after a trial in that case, reported in *T. & M. Transp. Co.* v. *S. W. Shattuck Chemical Co.*, 148 F. 2d 777 (1945), the Circuit Court of Appeals, Tenth Circuit, stated that if an interstate motor carrier promises to select the cheapest available rate and route and to ship merchandise accordingly, and fails to do so, it is liable to the shipper in damages for the difference between the rate charged and the cheapest applicable and available rate, citing *Northern Pacific R.* v. *Solum*, 247 U. S. 477; *Western Grain Co.* v. *St. Louis-San Francisco R. Co.*, 5 Cir., 56 F. 2d 160; *Galveston, H. & S. A. R. Co.* v. *Lykes Bros.*, D. C., 294 F. 968; *St. Louis Southwestern R.* v. *Lewellen Bros.*, 5 Cir., 192 F. 540; *Roberts Federal Liabilities of Carriers*, Second Edition, Sec. 332, p. 659.

The Courts below have held that the decision of this Court in the case of *T. I. M. E. Inc.* v. *United States of America*, 359 U. S. 464, authorizes the conclusion that the Motor Carrier Act has destroyed the common law action for damages sustained by a shipper as a result of motor carrier misrouting and has left him without any remedy against such unlawful conduct. Needless to say, such harsh result can bring about shocking consequences in the area of national motor transportation. In remarks by General Counsel of the Interstate Commerce Commission, expressing the views of the Interstate Commerce Commission,

that the decision of this Court in *T. I. M. E. supra*, has no application to the case at bar (R. 22a), appears the following:

> "Obviously, once a carrier takes possession of a shipment, the shipper has no way to guard against a carrier misrouting his shipment. It would be contrary to all sense of fair play to hold that a shipper is so at the mercy of a carrier that the latter may collect and retain the rate over whatever route it chooses to transport even though it violates its duty to select the cheapest route available to it. Consequently, the courts have recognized the right of shippers to protection from misrouting by the transporting carrier."

In *T. I. M. E. supra*, this Court in stating the issue before it for decision, said at page 165:

> "These cases present in common a single question under the Motor Carrier Act: Can a shipper of goods by a certificated motor carrier challenge in postshipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?"

This question was answered in the negative in a 5 to 4 decision, the Court holding, in substance, that a shipper does not have a justiciable legal right to recover past motor carrier charges to the extent that such charges were *intrinsically* unreasonable. There was no question of misrouting. No claim is being made in the case at bar that the rates charged by the respondent carrier are unreasonable *per se*. The real claim is that the carrier subjected the petitioner herein to wrongful charges by transporting its shipments over more expensive interstate routes contrary to respondent's duty, as a common carrier, to transport the unrouted shipments over the less expensive intrastate routes, in the absence of adequate justification for failure to do so.

Although the respondent carrier's practice in transporting the shipments over the higher-rated route may be characterized as an "unreasonable" one, nevertheless, it is not necessary to label it in such manner in order to state a cause of action. The allegations in the first count of the complaint (R. 2a), employing the words "reasonable" and "unreasonable", are conclusory and mere surplusage and cannot have the effect of casting this simple misrouting action into the class of actions involving intrinsic unreasonableness of rates, proscribed by *T. I. M. E., supra*. Although misrouting has been classified as an unreasonable practice, nevertheless, misrouting claims involve the payment of legal and supposedly reasonable charges resulting from the use of a higher rated route than an equally available lower rated route, each rate being the legal rate for its particular route, not whether either rate is unreasonable for application over its particular route. This difference, it is respectfully submitted, prevents the *T. I. M. E.* case from being applicable to claims for misrouting.

In the case of *Miller* v. *Davis, Director General of Railroad*, 213 Iowa 1091 (Sup. Ct. Iowa, 1932), a misrouting action, the Court said in part:

> "This is not a case in which the reasonableness of a rate is involved. It is a case in which it is claimed the wrong rate was applied because the goods were shipped by the wrong route, contrary to the rights of the shipper."

In the case of *Galveston, H. & S. A. Ry. Co.* v. *Lykes Bros.*, 294 Fed. 968 (U. S. D. C., S. D., Texas, 1923), the Court recognized the principle that where a shipper gives no routing directions, and the carrier forwards the traffic over one route when another route carrying a lower rate is equally available, the carrier must refund to the shipper the difference between the higher rate and the rate applying over the less expensive route. The Court said, at page 973:

> "This, then, is not a case of reparation on account of unlawful or unreasonable tariffs".

In *Northern Pacific Ry. Co. v. Solum, supra*, this Court said at page 482:

> "In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route. But the duty is not an absolute one. The obligation of the carrier is to deal justly with the shipper, not to consider only his interests and to disregard wholly, its own and those of the general public. If, all things considered, it would be unreasonable to ship by the cheaper route, the carrier is not compelled to do so. The duty is upon the carrier to select the cheaper route only 'if other conditions are reasonably equal'."

This Court held that whether the conditions are reasonably equal presents an administrative question for the Interstate Commerce Commission. If the Commission should determine that the "conditions are reasonably equal", it must be concluded that the carrier violated its obligation to the shipper to ship by the cheaper route, and the shipper is entitled to recover in a court of law the difference between the charges paid and those that would have accrued over the cheaper route.

In the case at bar, the petitioner filed a complaint with the Interstate Commerce Commission seeking an administrative finding as to whether the facts surrounding the movement justified the conduct of the respondent carrier in transporting the considered shipments over the higher rated interstate route, so that such finding would be in aid of the Court in determining whether petitioner is entitled to prevail in this action. Cf. *United States v. Western Pacific R. Co.*, 352 U. S. 59. It is respectfully submitted that the Commission had power to make such finding.

While *T. I. M. E.* deprives the Commission of jurisdiction to determine the intrinsic reasonableness of past motor carrier rates, that case should not be interpreted so as to entirely prohibit the Commission from making findings on any other administrative issues in aid of the courts in litigation pending therein.

In *Riss & Company* v. *Association of American Railroads*, 178 F. Supp. 438 (District of Columbia, 1959), the Court in discussing *T. I. M. E.*, said at page 446:

> "This Court does not hold that *all* common-law remedies heretofore available at common law against motor carriers did not survive the Motor Carrier Act of 1935 * * *."

It is submitted that *T. I. M. E.* does not authorize the abolition of a cause of action for motor carrier misrouting. The factors that persuaded the majority of the Justices in that case to make their decision are not present in a case of misrouting. This rationale is well expressed in the analysis made by Judge Moore in his dissenting opinion, below (*infra*, Appendix A, pp. 16-22). Whereas Congress has provided the shipper with an opportunity to protest the reasonableness of rates filed by motor carriers with the Interstate Commerce Commission before the effective date thereof, no similar protection is afforded a shipper against misrouting by a carrier.

Certainly, equity and good conscience would dictate, that under the circumstances existing in this case, as well as in all misrouting cases, the shipper should have a remedy for the patent wrong committed by the carrier. In the case at bar, the carrier by its own wrongful conduct has become unjustly enriched at the expense of the shipper in the sum of $10,000.00. No carrier should be permitted to take refuge in this Court's decision in the *T. I. M. E.* case in an effort to be immunized against liability for such wrong. If this Court allows the decision of the Courts below to

become the law of the land, some motor carriers may be tempted to prey upon the unprotected shippers by resorting to the technique of misrouting shipments and mulcting the shipping public of millions of dollars a year without fear of civil prosecution. *T. I. M. E.* should be limited to its own facts and should not be extended to deprive shippers of their common law right to recover damages for carrier misrouting. It is respectfully submitted that the instant suit to recover for misrouting is judicially cognizable and that the Courts below were in error in making a contrary determination.

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

HARRY TEICHNER,
Attorney for Petitioner.

October 2, 1961.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 268—October Term, 1960.

(Argued February 23, 1961 Decided July 25, 1961.)

Docket No. 26685

HEWITT-ROBINS INCORPORATED,
Plaintiff-Appellant,

—against—

EASTERN FREIGHT-WAYS, INC.,
Defendant-Appellee.

Before:

HINCKS and MOORE, *Circuit Judges*,
and BRENNAN, *District Judge*.*

Appeal from an order of the United States District Court for the Southern District of New York, Alexander Bicks, *Judge*, and judgment entered thereon, dismissing appellant's complaint pursuant to Rules 12-b, 12-c and Rule 56 of the Federal Rules of Civil Procedure, 187 F. S. 722. *Affirmed.*

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* Sitting by designation.

HARRY TEICHNER, Brooklyn 1, New York, *for plaintiff-appellant.*

GOLDMAN & DRAZEN, New York, New York (Milton D. Goldman and Wilfred R. Caron on the brief), *for defendant-appellee.*

BRENNAN, *District Judge*:

The question involved in this litigation requires the application of the provisions of the Interstate Commerce Act (49 U. S. C. 301-327), sometimes known as the Motor Carrier Act, to the facts disclosed in the complaint. The Court below held the complaint to be insufficient under Rules 12-b, 12-c and 56 F. R. C. P. to present a justiciable issue. A brief statement of facts is set out below.

During the period from January 1953 to February 1955, the appellant delivered to the appellee at Buffalo and New York City numerous unrouted shipments of cartons containing foam rubber pads for transportation between the two above cities. The service was performed by the appellee over an interstate route. The freight charges, in accordance with the filed tariff for such route, were paid by appellant who seeks to recover some $10,000 which represents the excess of said charges over those applicable to an alternate intrastate route.

The appellee, hereinafter referred to as "Eastern," is a certified common carrier by motor vehicle, possessing operating rights between Buffalo and New York City over both interstate and intrastate routes. The applicable rates for the interstate movement were somewhat higher than the rates for the intrastate movement as fixed in the tariffs filed with the Interstate Commerce Commission and the Public Service Commission of the State of New York.

The complaint alleges specifically that the action "arises under Part II of the Interstate Commerce Act, U. S. Code, Title 49, Sections 301 to 327." It is further alleged therein that the "* * * rates charged * * * and the practice of the defendant in misrouting the shipments * * * were unjust and unreasonable in violation of Section 216, Part II, of the Interstate Commerce Act (U. S. Code, Title 49, Section 316)." Other allegations are found in the complaint asserting the unreasonableness of the rates charged, all of which are put in issue by the answer. The appellant recognizes the jurisdiction of the Interstate Commerce Commission in the matters referred to in the above allegations. The complaint requests a stay of the determination of the issues involved until the Interstate Commerce Commission could determine "the reasonable and just rates for the transportation of the aforesaid shipments" in a proceeding to be instituted by appellant upon the commencement of the action. It may be stated that such a proceeding was taken and an administrative determination was made holding that Eastern's routing practice, as indicated above, was unreasonable. A cease and desist order to operate prospectively was entered. Such determination is challenged by Eastern in an action to review same. The action is pending in the United States District Court for the District of New Jersey.

Subsequent to the commencement of this action, the Supreme Court handed down the decision reported as *T. I. M. E. Inc. v. United States*, 359 U. S. 464. The lower court relied upon that decision in holding that the complaint, insofar as it is based upon the statute, does not state a claim upon which relief may be granted. The appellant's argument that this action may be distinguished from the holding in the *T. I. M. E.* case, because the later decision involved rates which were intrinsically unreasonable while

here the rates are unreasonable by reason of misrouting, is not persuasive. Under Part I of the Interstate Commerce Act, 49 U. S. C. A. §§1, *et seq.*, "Whether the practice of the carrier of shipping over the interstate route was reasonable, when a lower intrastate route was open to it, presents an administrative question. * * *" *Northern Pacific Ry. Co. v. Solum*, 247 U. S. 477, 482-483.[1] The same practice when arising under the Motor Carrier Act, §§201, *et seq.*, Part II of Interstate Commerce Act, 49 U. S. C. A. §§301, *et seq.*,[2] must necessarily be an administrative question. For there is no significant difference of language between the applicable sections of Part I of the Interstate Commerce Act and of the Motor Carrier Act. It follows that the rationale of the *T. I. M. E.* case, pages 172, *et seq.*, is directly applicable here; if, as *T. I. M. E.* holds, under the saving clause of §216(c) of the Motor Carrier Act, 49 U. S. C. A. §316(c), no common law remedy is saved to a

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[1] Part I of the Interstate Commerce Act, 49 U. S. C. A. §1(5), with respect to carriers by rail provides that "all charges * * * shall be just and reasonable, and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful." 49 U. S. C. A. §1(6) provides that "every unjust and unreasonable * * * practice is prohibited and declared to be unlawful." 49 U. S. C. A. §15(1) provides that whenever * * * the Commission * * * shall be of opinion * * * that any individual or joint * * * practice whatsoever * * * is or will be unjust or unreasonable * * * the Commission is authorized and empowered to determine * * * what individual * * * practice is or will be just, fair, and reasonable."

[2] Similarly, the Motor Carrier Act §§216(b) and (d), 49 U. S. C. A. §§316(b) and (d), provides that it "shall be the duty of every common carrier of property by motor vehicle * * * to establish * * * just and reasonable rates * * * and practices * * *" and that all such charges "shall be just and reasonable and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful." And §216(e) of the Motor Carrier Act, 49 U. S. C. A. §316(e), provides that whenever "the Commission shall be of the opinion that any individual * * * rate * * * or practice * * * is or will be unjust and unreasonable * * * it shall determine * * * the lawful rate or the lawful * * * practice."

shipper aggrieved by an unreasonable rate, which was an administrative question, no such remedy is saved to a shipper aggrieved by the application of an unreasonable route, which was also an administrative question as held in *Northern Pacific Ry. Co.* v. *Solum, supra.*

Affirmed.

MOORE, *Circuit Judge* (dissenting):

The merits of the only question now before the court to me seem so clear that it is difficult to conceive of any ground for disagreement. The question is: should plaintiff (appellant) be deprived of an opportunity to place its case before a trial court upon all the facts or, stated in different form, should the doors of the court house be permanently closed to it after a perusal of the pleadings. The doors have been closed by the district court; the majority here now securely bolts them. The only real issue which the complaint submits for determination is the misrouting of plaintiff's shipments. The majority, as did the District Court, bases its decision upon a recent opinion by the Supreme Court in *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464 (1959) wherein that court in a five-to-four decision held that a shipper of goods by motor carrier in post-shipment litigation cannot challenge the reasonableness of the carrier's charges which had been made in accordance with filed tariffs governing the shipment.

Unlike the *T. I. M. E.* case, no issue of reasonableness of rates is here presented in fact, the rates filed are not challenged. The gravamen of the complaint is that defendant carried the goods over the wrong route for which error it should not be charged.

Plaintiff has obtained a ruling from the Commission in an administrative proceeding that the practice was un-

reasonable." However, merely because the word "unreasonable" appears in the *T. I. M. E.* opinion, wherein a recovery for unreasonable rates was denied, does not make it logical to place the decision here upon the reasoning that *T. I. M. E.* held that no common law remedy was saved to a shipper aggrieved by an unreasonable rate, that the determination of "unreasonable rate" was an administrative question; also, therefore, because misrouting was unreasonable and so determined in an administrative proceeding, no common law remedy was available or preserved by the exceptive provisions of the statute (Section 216(j), 49 U. S. C. §316(j)(: "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."). In my opinion, this is specious syllogistic reasoning wherein parallelism is sought to be created by looking only at the words "unreasonable" and "administrative" without analyzing the real basis underlying the result in the *T. I. M. E.* case. The opinions therein of Mr. Justice Harlan for the majority and Mr. Justice Black for the minority four members of the court trace the legislative history carefully and exhaustively. Their respective views are stated with great clarity and, although differing in result on the specific facts with which they were dealing, even the majority opinion does not preclude a decision that on the facts here presented plaintiff would not have a right to be heard in a federal court.

As the Supreme Court pointed out, "the Motor Carrier Act apparently sought to strike a balance between the interests of the shipper and those of the carrier, and * * * the statute cut significantly into pre-existing rights of the carrier to set his own rates and put them into immediate effect * * *." Thus "[u]nder the Act a trucker can raise its rates only on 30 days' prior notice, and the I. C. C. may, on its own initiative or on complaint, suspend the effective-

ness of the proposed rate for an additional seven months while its reasonableness is scrutinized." (*T. I. M. E.*, pp. 479-480.) And as the *T. I. M. E.* decision further notes, this seven-month suspension period is usually ample to permit the adjudication of the rate's reasonableness. The issue in *T. I. M. E.*, therefore, was whether the shipper could recover in a common law action an asserted unreasonable charge when the rate had been previously filed with the Commission after notice to all concerned and had been approved by the Commission to the extent of permitting it to prevail when it could have been suspended. Congress having provided the shipper with such a built-in protection, it was not unreasonable to assume that the shipper's common law right to recover on the theory that the filed rate was unreasonable was implicitly extinguished by the Act. In fact, to allow such a remedy to stand would be inconsistent with and undercut the anticipatory procedures provided.

The situation is vastly different here. As to unreasonable routing practice, no built-in protection for the shipper has been provided. Nor does a shipper have notice that it will be routed around Robin Hood's Barn until after this has actually occurred. In effect the shipper is in a position similar to that of a shipper who has been charged a rate in excess of the filed tariff. In such a situation even the legislative history referred to in *T. I. M. E.* indicates that such overcharges can still be recovered in a court proceeding.[1] That decision also suggests a distinction both per-

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[1] *T. I. M. E.*, footnote 18, pp. 477-478, reads in part:

"It is suggested that Congress was fully informed at the time of passage of the Transportation Act of 1940 of 'an existing interpretation' of the Motor Carrier Act which would allow common-law actions for the recovery of unreasonable rates. We do not so read the legislative history relied upon. On the contrary, Commissioner Eastman, testifying before the Senate Committee, appeared to distinguish between the availability of

tinent and applicable here. The shipper in *T. I. M. E.* was relying on certain legislative history to support its view that there existed a common law remedy for the recovery of unreasonable rates. In reading this history contrary to the shipper's view, the Court noted Commissioner Eastman's testimony as distinguishing "between the availability of a judicial remedy in respect of inapplicable tariff rates and the unavailability of such a remedy in respect of rates claimed to be 'unreasonable' though embodied in a filed tariff." The former situation seems clearly applicable to this case, since it is claimed by plaintiff, not that the tariff rate itself is unreasonable, but that the application of this rate to the particular shipment was unreasonable.

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a judicial remedy in respect of inapplicable tariff rates and the unavailability of such a remedy in respect of rates claimed to be 'unreasonable' though embodied in a filed tariff. The Commissioner said:

"'So far as reparation is concerned, there is no reason why these provisions should not be applied to motor carriers as well as to railroads. They were omitted from the Motor Carrier Act only because of the desire to lighten the burdens of the motor carriers in the early stages of regulation, in the absence of any strong indication of public need. Motor carriers have practically no traffic which is noncompetitive, and there is little danger that they will exact exorbitant charges. Since the Motor Carrier Act became effective in 1935, the Commission has not once had occasion to condemn motor-carrier rates as unreasonably high. I don't think we have had any complaints to that effect. It follows that there is nothing to indicate that shippers need provisions to enable the Commission to award reparation for damages suffered because of unreasonable charges.

"'The occasion for reparation from motor carriers would chiefly arise, therefore, in the event of overcharges above published tariff rates. Shippers can recover *such overcharges* in court as the law now stands.' (Emphasis added.)

"Hearings before Senate Interstate Commerce Committee on S. 1310, S. 2016, S. 1869, and S. 2009, 76th Cong., 1st Sess., pp. 791-792."

The Supreme Court "has frequently had occasion to say that interpretations of statutes by agencies charged with their administration are entitled to very great weight." *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378 (1931); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). Although it does not reach the status of an agency interpretation, the analysis of the situation now before this court made by the Interstate Commerce Commission, Office of the General Counsel, with respect to the effect of the *T. I. M. E.* case on this case is so accurate that it is entitled, in my opinion, both to respect and to weight.

> "Thus, the claim [in the instant case] is not that the rate charged was intrinsically unreasonable, rather the controversy is over which of two rates, each embodied in published tariffs of the carrier, should have been charged. The *T. I. M. E.* and *Davidson* cases do not purport to deal with the present situation.
>
> "Obviously, once a carrier takes possession of a shipment, the shipper has no way to guard against a carrier misrouting his shipment. It would be contrary to all sense of fair play to hold that a shipper is so at the mercy of a carrier that the latter may collect and retain the rate over whatever route it chooses to transport even though it violates its duty to select the cheapest route available to it. Consequently, the courts have recognized the right of shippers to protection from misrouting by the transporting carrier. For example, in *Wooleyan Transportation Co.* v. *George Rutledge Co.*, 162 F. 2d 1016 (3rd Cir. 1947), the carrier quoted the shipper an intrastate rate for transporting goods between two points in New Jersey. The carrier, however, moved the goods via its interstate route and demanded payment on the basis of its higher interstate route, contending that it was

required by the Interstate Commerce Act to observe its interstate rate by the route of movement. In denying recovery by the carrier the Court of Appeals said:

"* * * The contract between the parties was for intrastate carriage of the goods by motor truck between Montclair and Pedricktown, * * * Instead, for its own convenience and because of certain union contracts with its truck drivers, it transported the goods over a longer interstate route, via Wilmington, Delaware. By such unilateral action, however, it could not convert a lawful contract for intrastate carriage into one for interstate carriage so as to impose upon the defendant shipper liability for a rate higher than it had agreed to pay.

"* * * Here, however, the plaintiff, with the obvious direct intrastate route open to it, took the defendant's goods around Robin Hood's barn in getting them from Montclair to Pedricktown."

Counsel concludes (as do I) that:

"As I have indicated, the *T. I. M. E.* and *Davidson* cases do not require the conclusion that a suit to recover for misrouting is not judicially cognizable."

As Mr. Justice Black pointed out in his dissent in *T. I. M. E.*:

"There can be no serious doubt that at common law a cause of action existed against carriers who charged unreasonable rates. See *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 383.[1] Nor can it be questioned that the Motor Carrier Act confirmed the common-law policy against unreason-

able rates and in fact expressly made such rates illegal.[2] It is also clear that the Act attempted to preserve all pre-existing remedies which did not directly conflict with its aims."[3]

There may be sufficient reasons for denying redress in the courts to shippers for claims that filed rates are unreasonable but it by no means follows that shippers should be deprived of access to the courts for all wrongful acts committed by motor carriers, for example, mishandling, erroneous billing, misrouting, etc.

Such a determination would not prejudice the carrier's defenses such as agreement to the interstate route, payment of the charges with knowledge, acquiescence, estoppel, laches, etc., any or all of which may well defeat plaintiff's claim but at least plaintiff would thus have a determination on the merits and not be left without remedy merely because its complaint mentioned a statutory basis for its asserted claim.

I would reverse.

APPENDIX B

(Judgment)

(Filed July 25, 1961)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of July, one thousand nine hundred and sixty-one.

Present:—HON. CARROLL C. HINCKS,

HON. LEONARD P. MOORE,
Circuit Judges,

HON. STEPHEN W. BRENNAN,
District Judge.

HEWITT-ROBINS INCORPORATED,
Plaintiff-Appellant,

—v.—

EASTERN FREIGHT-WAYS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order and judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 457

HEWITT-ROBINS INCORPORATED,
Petitioner,

v.

EASTERN FREIGHT WAYS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

MILTON D. GOLDMAN,
29 Broadway,
New York 6, N. Y.,
Attorney for Respondent.

MILTON D. GOLDMAN,
WILFRED R. CARON,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 491

HEWITT ROBINS INCORPORATED,

Petitioner,

v.

EASTERN FREIGHT WAYS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The majority opinion of the Court of Appeals for the Second Circuit, and the dissenting opinion of Judge Moore, are officially reported at 293 F. 2d 295.

Question Presented

This respondent is dissatisfied with the petitioner's presentation of the "Question Presented". Rules of U. S. Supreme Court, Rule 40(3).

The gravamen of the complaint is that the respondent's established routing practice, followed and applied to petitioner's 350 shipments for more than two years, was unreasonable within the meaning of Section 216 of Part II of the Interstate Commerce Act (49 U.S.C. 316) (hereinafter sometimes referred to as the "Act"). Pursuant to paragraph 8 of the complaint, the petitioner obtained a ruling from Division 3 of the Interstate Commerce Commission (*one Commissioner dissenting*) to the effect that the respondent's routing practice was unreasonable within the meaning of Section 216 of the Act, and an order was entered directing the respondent to cease and desist from said practice. *Hewitt-Robins Incorporated* v. *Eastern Freight-Ways, Inc.*, 302 I.C.C. Reports 173 (1957). Thereafter, upon the authority of this Court's decision in *T.I.M.E., Inc.* v. *United States*, 359 U. S. 464 (1959), the District Court dismissed the complaint upon the grounds that the Act did not create a statutory cause of action to recover reparations for unreasonable routing practices, nor did it preserve any previous common-law right of recovery. The Court of Appeals affirmed, one judge dissenting.

It is respectfully submitted that under the theory of petitioner's complaint, the only question presented is

> Whether Part II of the Interstate Commerce Act creates a statutory cause of action whereby a shipper of goods may, in post-shipment litigation, challenge a motor carrier's regular routing practice as unreasonable within the meaning of Section 216 of the Act and, upon a finding to that effect by the Interstate Commerce Commission, recover the difference between (a) the rates charged in accordance with applicable filed tariffs and (b) the rates applicable to the route found by the Commission to be more reasonable.

Statute Involved

Under the respondent's view of the "Question Presented", the entirety of Part II of the Interstate Commerce Act (49 U.S.C. § 301-327) is involved herein, although the statutory provisions which are most directly relevant to decision of this case, and the pertinent texts of which are set forth in the Appendix hereto, are subdivisions (b) and (e) of Section 216 of the Act [49 U.S.C. 316(b) and (e)].

Statement

Petitioner's statement of the case contains most of the material facts alleged in the First Count of the complaint. However, it merely glosses over the fact which is most material to the issue, *viz.* that the respondent's alleged liability is specifically and repeatedly predicated solely upon its alleged failure to maintain a reasonable routing practice within the meaning of Section 216 of the Act. (R. 3a, 4a) It may also be added that the respondent's answer denies petitioner's allegations of unreasonableness and contains three affirmative defenses, the third of which alleges, *inter alia*, that the petitioner agreed to the use of respondent's interstate route by way of respondent's New Jersey terminal for the purpose of assembly and or breakdown and delivery, and that petitioner's less than full load shipments could not be handled as direct intra state shipments. (R. 9a-10a) Thus, the reasonableness of respondent's routing practice was drawn in issue by the pleadings and was thereafter administratively resolved adversely to the respondent by the Interstate Commerce Commission. *Hewitt-Robins Incorporated* v. *Eastern Freight Ways, Inc.*, *supra*.

ARGUMENT

The petitioner has failed to show any special or important reason why this Court, in the exercise of sound judicial discretion, should review this case on writ of certiorari.

Rule 19(1)(b) of the Rules of this Court, though neither controlling nor fully measuring this Court's discretion, sets forth the character of reasons which will be considered in passing upon a petition for certiorari to a court of appeals. The petitioner attempts to make out two of those reasons, *viz.*: that the Court of Appeals for the Second Circuit has erroneously decided an important question of federal law which has not been, but should be, settled by this Court; and that the decision below is allegedly "irreconcilable" with that of the Third Circuit in *Wooleyhan Transportation Co. v. George Rathdaji Co.*, 162 F. 2d 1016 (1947). The respondent, however, respectfully submits that neither those nor any other reasons exist for granting the writ.

There is No Important Question of Federal Law Which Has Not Been Settled by this Court

The dismissal of the petitioner's complaint was mandated by the only reasonable application of the principles so carefully explained by this Court in *T.I.M.E., Inc. v. United States*, 359 U. S. 464 (1959). Viewing the question as one of congressional intent, this Court held that Part II of the Interstate Commerce Act did not create a statutory cause of action, nor did it preserve any previously existing common law remedy, whereby a shipper of goods by motor carrier can challenge in post-

shipment litigation the reasonableness of the carrier's charges made in accordance with the governing tariff. This Court's rationale compels precisely the same legal conclusions with regard to a shipper's attempt in post shipment litigation to obtain reparations based upon a challenge to the reasonableness of a motor carrier's regular and established routing practice.

A. *Regarding a statutory remedy.* The petitioner's abandonment of efforts made below to sustain the existence of a statutory remedy makes that no less the issue in this case. Though the petitioner is silent, its complaint is not. As noted (*supra*, page 2), that pleading predicates the respondent's alleged liability upon a breach of the duty imposed by Section 216 of the Act. Subdivision (b) of Section 216 provides, in part:

> "(b) It shall be the duty of every common carrier of property by motor vehicle * * * to establish, observe, and enforce just and reasonable *rates*, charges, and classifications, and just and reasonable regulations and *practices* relating thereto * * *". (Emphasis supplied.)

In the *T.I.M.E.* case, this Court specifically refused to imply a statutory cause of action predicated upon a violation of the duties established in Section 216(b). Relying upon its decision in *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246 (1951), this Court held that Section 216(b) plainly creates only a criterion for administrative application rather than a justiciable legal right. Although the precise duty in issue in the *T.I.M.E.* case was the duty to establish reasonable rates, the foregoing interpretation was very evidently placed upon the entirety of Section 216(b) and the several duties contained therein, all of which are equally subject

to the primary jurisdiction and control of the Interstate Commerce Commission. It would be an anomaly, indeed, to hold that one duty creates a justiciable legal right whereas another imposed by the same subdivision merely prescribes a criterion for administrative application.

It would unduly lengthen this brief to restate the reasons which prompted this Court's ruling in *T.I.M.E.* The respondent submits that the "Question Presented" herein was very clearly settled by this Court in *T.I.M.E.*, and that the petitioner's complaint has been properly dismissed.

B. *Regarding a common-law remedy.* The respondent is constrained to answer the moot argument made by petitioner.

The petitioner attempts to fob off the entire theory of its complaint by characterizing its averment regarding respondent's alleged violation of Section 216 as mere "conclusion of law" (Pet., p. 3). Having thus disclaimed its pleading as well as its own proceeding under Section 216 before the Interstate Commerce Commission, the petitioner now argues that the respondent is subject to a surviving *common-law* duty for the violation of which the respondent may be compelled to pay reparations.

The first obvious fallacy in petitioner's position is that there is no *surviving* common-law duty. The enactment in 1935 of Part II of the Interstate Commerce Act brought the relatively new industry of common carriage by motor vehicle under the federal administrative control to which certain other common carriers had theretofore been subject under Part I of the Act. Section 216 of the Act prescribed certain standards and imposed certain duties by which motor carriers would thereafter be bound. It is fundamental that those standards and duties superseded

any and all standards, statutory or otherwise, which may have theretofore obtained with respect to the same subject matter. Respondent is bound only by the duty prescribed by Section 216(b) as properly construed by the Interstate Commerce Commission. There is no dual standard. If a routing practice is deemed reasonable by the Commission within the meaning of Section 216, it is not subject to attack by any other standard. If it should be held to violate that section, then no other standard is competent to justify it.

As was held by the Commission in the instant case, "misrouting is an unreasonable practice violative of the provisions of Section 216(b) of the act * * *". *Health Robins Incorporated* v. *Eastern Freight Ways, Inc.*, 302 I.C.C. Reports 173, 174 (1957). Whether a routing practice is unreasonable falls squarely within the primary jurisdiction of the Interstate Commerce Commission.

> *Great Atlantic & Pacific Tea Co.* v. *Ontario Freight Lines Corp.*, 46 I.C.C. 237, 238-239 (1946);
>
> *St. Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 483 (1918).

This basic proposition was effectively conceded by petitioner when it referred the question of unreasonableness to the Commission. What, then, must petitioner's position be? It is that Section 216(j) of the Act preserved a hybrid form of action whereby a general right of recovery at common-law survives in favor of a shipper, based, however, upon a violation of a statutory duty imposed by Section 216(b) and a finding to that effect by the Interstate Commerce Commission in the exercise of its primary jurisdiction to administer the Act. In principle, this is

precisely the same contention made by the Government and rejected by this Court in the *T. I. M. E.* case. The essence of its decision is contained in the following statement by Justice Harlan, writing for the majority:

> "We do not think that Congress, which we cannot assume was unaware of the holding of the *Hilo* case that a common-law right of action to recover unreasonable common carrier charges is incompatible with a statutory scheme in which the courts have no authority to adjudicate the primary question in issue, intended by the savings clause of §16(j) to sanction a procedure such as that here proposed. It would be anomalous to hold that Congress intended that the sole effect of the omission of reparations provisions in the Motor Carrier Act would be to require the shipper in effect to bring two lawsuits instead of one, with the parties required to file their complaint and answer in a court of competent jurisdiction and then immediately proceed to the I.C.C. to litigate what would ordinarily be the sole controverted issue in the suit. No convincing reason has been suggested to us why Congress would have wished to omit a direct reparations procedure, as it has concededly here done, and yet leave open to the shipper the circuitous route contended for" (at page 474).

The petitioner attempts to avoid the application of the *T. I. M. E.* case by pressing the inconsequential point that there the issue involved rates "*intrinsically* unreasonable" or "unreasonable *per se*" (Pet., p. 7). It may be admitted that a technical distinction exists between a claim that a rate is unreasonable in itself and a claim that an unreasonable routing practice has resulted in the application of a rate in excess of the rate applicable to the reasonable route. However, such a distinction is without any significance in the context of the question here presented and it

does not avoid the effect of the *T. I. M. E.* case as binding precedent against the petitioner. The reasonableness of a routing practice, no less than the reasonableness of a rate, is a question exclusively for administrative determination by the Interstate Commerce Commission. That is the controlling factor which brings this case squarely within the rationale of the *T. I. M. E.* case.

The petitioner further attempts to avoid the effect of the *T. I. M. E.* case by conjuring up an image of the motor carrier industry preying upon "unprotected shippers by resorting to the technique of misrouting shipments and muleting the shipping public of millions of dollars a year without fear of civil prosecution." (Pet., p. 11) This statement is patently misleading and constitutes a crude attempt to forge a question of national interest. In the first place, a routing practice found to be unreasonable under Section 216 does not fill the coffers of the erring carrier to overflowing where, as here, the rate charged is admittedly in accordance with filed tariffs and applicable to the route employed. In such instances, the carrier collects only that sum which is reasonable for the service actually rendered. The illusion of a pillaging and unprincipled industry is hardly appropriate. Secondly, Section 216(e) of the Act accords the shipper the right at any time to challenge a routing practice before the Interstate Commerce Commission which, if it should find against the carrier, may forever restrain it. Contrary to the argument of petitioner, and with due deference to the view of Judge Moore in his dissenting opinion, such a proceeding may be instituted not only as to a routing practice in effect, but also as to one "*proposed to be put into effect*" 49 U.S.C. §316(e). (Emphasis supplied.) This is complete protection against a practice which, viewed most severely, can

be regarded as nothing more than a good faith failure to comply with a statutory standard. The petitioner's complaint does not allege bad faith on the part of respondent. It does not allege that respondent profited in the amount of the sum sought to be recovered. In point of fact it could not, for as noted, the rate paid was the fair charge for the service rendered. If the petitioner succeeded, the respondent would be subjected to a considerable loss on the transactions involved.

This is not a case of overcharges which, as defined by the Act, are "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." 49 U.S.C. §304a (5).

> *Kahn, Principles of Motor Carrier Regulation*, 156 (1958);
>
> *Great Atlantic & Pacific Tea Co. v. Ontario Freight Lines Corp., supra*, at 239;
>
> *Cf. Brown Coal Co. v. Director General*, 87 I. C. C. 130, 131 (1923).

The common-law cause of action for overcharges is specifically recognized and preserved by the Act. 49 U.S.C. §304a (1). Judge Moore in his dissent seems to have misinterpreted this as a case involving overcharges (Pet., pp. 18-19).

Summary

Regardless of how the "Question Presented" herein may be viewed, this case presents no important question of federal law which was not thoroughly reviewed and settled in the *T.I.M.E.* case. The petitioner's complaint was properly dismissed under the authority of *T.I.M.E.*

There is No Conflict Between the Decision Below and the *Wooleyhan* Case

There is no merit to the petitioner's suggestion that the decision below is irreconcilable with the decision of the Court of Appeals for the Third Circuit in *Wooleyhan Transportation Co. v. George Rutledge Co.*, 162 F. 2d 1016 (1947). There, the plaintiff carrier and defendant shipper specifically agreed on the rate for the intrastate carriage of goods between two points in the State of New Jersey. However, the carrier unilaterally employed an interstate route and thereafter commenced an action to recover on the basis of the higher interstate rate. *No claim was made by the carrier to justify its use of the interstate route.* The Third Circuit upheld the nonsuit directed at the end of plaintiff's case, stating that the carrier could not unilaterally change the specific agreement as to rates. There was no question in the *Wooleyhan* case concerning the reasonableness of a routing practice, the jurisdiction of the Interstate Commerce Commission, or the effect of the Interstate Commerce Act upon the right of recovery. In short, there is no parallel between this case and the *Wooleyhan* decision, and therefore there can be no conflict. Even if there were conflict, it would be of no moment since the intervening decision of this Court in *T.I.M.E.* would clearly settle any doubt as to the correct law applicable to the question here presented.

It is unnecessary to discuss the other authorities cited by petitioner. They simply have no direct bearing on the issue.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MILTON D. GOLDMAN,
Attorney for Respondent

MILTON D. GOLDMAN,
WILFRED R. CARON,
Of Counsel.

APPENDIX

Subdivisions (b) and (e) of Section 216 of Part II of the Interstate Commerce Act, 49 U. S. C. 316(b)-(e), provide as follows:

"(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce."

. . . . .

"(e) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 317 of this title. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate,

fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudical, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however*, That nothing in this chapter shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 37

HEWITT-ROBINS INCORPORATED,

Petitioner,

—v.—

EASTERN FREIGHT-WAYS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

HARRY TEICHNER,
66 Court Street,
Brooklyn 1, New York,
Attorney for Petitioner.

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HEWITT ROBINS INCORPORATED,

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 20) is reported in 187 F. Supp. 722.

The majority opinion of the Court of Appeals (R. 23) and the dissenting opinion of Judge Moore (R. 27) are reported in 293 F. 2d 205.

Jurisdiction

The judgment of the Court of Appeals was entered on July 25, 1961 (R. 32). The petition for a writ of certiorari

was filed on October 11, 1961 and granted on January 8, 1962 (R. 33). 368 U. S. 951. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Statute Involved

The chief statute involved is the Motor Carrier Act §§291, *et seq.*, Part II of the Interstate Commerce Act, 49 U. S. C. §§301-327, the pertinent portion of which is Section 216 (j) of the Motor Carrier Act [49 U. S. C. §316 (j)] providing as follows:

> "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

Question Presented

Whether the common law action for damages sustained by a shipper by reason of motor carrier misrouting of a shipment of goods has survived the enactment of the Motor Carrier Act §§291, *et seq.*, Part II of the Interstate Commerce Act, 49 U. S. C. §§301-327.

Statement

This is an action by petitioner, a shipper of goods, against respondent, a common carrier by motor vehicle, to recover damages sustained by petitioner by reason of respondent's misrouting of numerous shipments of the petitioner.

Between January 1, 1953 and February 1, 1955, the petitioner delivered numerous shipments of foam rubber pads to the respondent, a common carrier by motor vehicle, for transportation from Buffalo, N. Y., to New York City, N. Y. The respondent possessed operating rights over an interstate route between those points, as well as an intrastate route. The applicable rates for the interstate movement, as published in tariffs on file with the Interstate Commerce Commission,

were higher than the applicable rates for the intrastate movement, as published in tariffs on file with the Public Service Commission of New York. These shipments were tendered unrouted by the petitioner.

In the first count of the complaint herein (R. 1) the petitioner alleges that the respondent transported said shipments over its higher-rated interstate route, and that by reason thereof the respondent charged and collected from the petitioner the sum of $10,000.00 in excess of the charges that would have accrued if the respondent had moved the shipments over the less expensive intrastate route. The petitioner demands judgment in that amount.

The first count of the complaint (R. 1) alleges the conclusion of law that the respondent's conduct was an unreasonable practice in violation of the Interstate Commerce Act. It is also requested therein that the proceedings in this action be held in abeyance pending the filing of a complaint by the petitioner with the Interstate Commerce Commission for an order "determining the reasonable and just rates for the transportation of the aforesaid shipments."

Proceedings thereafter instituted by petitioner before the Interstate Commerce Commission resulted in a report made by the Commission, in which a finding was made that the lower-rated route should have been used by respondent in transporting said shipments. The Commission also found that the practice of respondent in using its higher-rated interstate route was an unreasonable practice. The report is published in *Hewitt-Robins Incorporated* v. *Eastern Freight Ways, Inc.*, 302 I. C. C. Reports 173 (1957).

Respondent, being dissatisfied with the Commission's decision, commenced an action against the United States of America and the Interstate Commerce Commission in the United States District Court for the District of New Jersey, to set aside the report and order of the Commission made in said proceedings. Petitioner was not made a party to that

action. The case was tried before Judge Richard Hartshorne in the United States District Court for the District of New Jersey, but no decision has been made therein, and such decision is being held in abeyance pending the determination of the instant appeal.

Subsequent to the commencement of this action and after the trial of the New Jersey action, the Supreme Court of the United States handed down the decision reported as *T. I. M. E. Inc. v. United States of America*, 359 U. S. 464 (1959). Respondent urged in the Courts below that this decision requires a dismissal of the complaint herein. District Judge Alexander Bicks in an opinion (R. 20), reported in 187 F. Supp. 722, agreed with respondent's contention, held that the savings clause of the Interstate Commerce Act, 49 U. S. C. §316(j) did not preserve the common law remedy of a shipper against a motor carrier to recover damages for misrouting, and made an order dismissing the complaint (R. 22) on the ground that no justiciable issue is presented upon which any relief may be granted to petitioner.

Upon appeal from the District Court's dismissal of the complaint, the Court of Appeals affirmed (R. 24-32), one Judge dissenting (R. 27-32). The opinions are reported in 293 F. 2d 205.

ARGUMENT

I.

THE COMPLAINT ALLEGES FACTS SHOWING A VIOLATION OF PETITIONER'S COMMON LAW RIGHT TO THE TRANSPORTATION OF ITS GOODS OVER THE CHEAPEST ROUTE.

Under the common law where a carrier maintains different rates on the same traffic over two open routes between the same points, and the freight rate over one route is less than such rate over the other route, if other conditions are reasonably equal, it is the duty of the carrier to transport the shipments between those points over the line which will give the shipper the benefit of the cheaper rate. *Northern Pacific Railway Co. v. Solum*, 247 U. S. 477, 482 (1918).

In *Woolwan Transportation Co. v. George Rutledge Co.*, 162 F. 2d 1016 (3rd Cir. 1947), the motor carrier quoted the shipper an intrastate rate for transporting goods between two points in New Jersey. The carrier, however, moved the goods via its interstate route and demanded payment on the basis of its higher interstate route, contending that it was required by the Interstate Commerce Act to observe its interstate rate by the route of movement. In denying recovery by the carrier the Court of Appeals said:

> "* * * The contract between the parties was for intrastate carriage of the goods by motor truck between Montclair and Fredericktown, * * *. Instead, for its own convenience and because of certain union contracts with its truck drivers, it transported the goods over a longer interstate route, via Wilmington, Delaware. By such unilateral action, however, it could not convert a lawful contract for intrastate carriage into one for interstate carriage so as to impose upon the defendant shipper liability for a rate higher than it had agreed to pay."

It seems clear that a delivery of a shipment to a carrier and acceptance by it without routing instructions, has the effect of writing into the contract of carriage a covenant to the effect that the carrier shall select the cheapest available route, all conditions being equal. Neither the Motor Carrier Act nor its legislative history evinces any intent to give the right to motor carriers to abrogate their contract obligations and increase their charges for transportation by resorting to the device of misrouting shipments.

In *S. W. Shattuck Chemical Co.* v. *T. & M. Transp. Co.*, 134 F. 2d 394, (10th Cir. 1943), it was held that in an action by an interstate motor carrier to recover under-charges of freight by reason of shipment over a route selected by the carrier, it was error to strike the shipper's answer and cross-petition alleging that there were other available routes over which rates did not exceed the amount paid and one of such routes should have been used.

In a subsequent appeal after a trial in that case, reported in *T. & M. Transp. Co.* v. *S. W. Shattuck Chemical Co.*, 148 F. 2d 777 (1945), the Circuit Court of Appeals, Tenth Circuit, stated that if an interstate motor carrier promises to select the cheapest available rate and route and to ship merchandise accordingly, and fails to do so, it is liable to the shipper in damages for the difference between the rate charged and the cheapest applicable and available rate, citing *Northern Pacific R.* v. *Solum*, 247 U. S. 477; *Western Grain Co.* v. *St. Louis-San Francisco R. Co.*, 5 Cir., 56 F. 2d 160; *Galveston, H. & S. A. R. Co.* v. *Lykes Bros.*, D. C., 294 F. 968; *St. Louis Southwestern R.* v. *Lewellen Bros.*, 5 Cir., 192 F. 540; *Roberts Federal Liabilities of Carriers*, Second Edition, Sec. 332, p. 659.

The Courts below and the respondent herein emphasize the fact that the complaint contains an allegation that the cause of action is founded upon the Motor Carrier Act and they conclude, therefore, that no justiciable issue exists for the reason that the Motor Carrier Act has not created a statu-

tory cause of action for damages for misrouting. We respectfully submit that the facts alleged in the complaint, and not the manner in which the cause of action is characterized, establish the proper criteria for determining whether a justiciable issue is presented upon which relief may be granted. Under the factual allegations of the complaint the real cause of action is to recover money unlawfully exacted from the petitioner. The right to recovery asserted by the petitioner is a traditional common law claim.

II.

THE COMMON LAW ACTION FOR DAMAGES SUSTAINED BY A SHIPPER BY REASON OF MOTOR CARRIER MISROUTING OF A SHIPMENT OF GOODS HAS SURVIVED THE ENACTMENT OF THE MOTOR CARRIER ACT.

The Courts below have held that the decision of this Court in the case of *T. I. M. E. Inc.* v. *United States of America*, 359 U. S. 464 (1959), authorizes the conclusion that the Motor Carrier Act has destroyed the common law action for damages sustained by a shipper as a result of motor carrier misrouting and has left him without any remedy against such unlawful conduct. Needless to say, such harsh result can bring about shocking consequences in the area of national motor transportation. In remarks by General Counsel of the Interstate Commerce Commission, expressing the views of the Interstate Commerce Commission, that the decision of this Court in *T. I. M. E. supra*, has no application to the case at bar (R. 16), appears the following:

> "Obviously, once a carrier takes possession of a shipment, the shipper has no way to guard against a carrier misrouting his shipment. It would be contrary to all sense of fair play to hold that a shipper is so at the mercy of a carrier that the latter may collect and retain the rate over whatever route it chooses to

> transport even though it violates its duty to select the cheapest route available to it. Consequently, the courts have recognized the right of shippers to protection from misrouting by the transporting carrier."

In *T. I. M. E. supra*, this Court in stating the issue before it for decision, said at page 465:

> "These cases present in common a single question under the Motor Carrier Act: Can a shipper of goods by a certificated motor carrier challenge in postshipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?"

This question was answered in the negative in a 5 to 4 decision, the Court holding, in substance, that a shipper does not have a justiciable legal right to recover past motor carrier charges to the extent that such charges were *intrinsically* unreasonable. There was no question of misrouting. No claim is being made in the case at bar that the rates charged by the respondent carrier are unreasonable *per se*. The real claim is that the carrier subjected the petitioner herein to wrongful charges by transporting its shipments over more expensive interstate routes contrary to respondent's duty, as a common carrier, to transport the unrouted shipments over the less expensive intrastate routes, in the absence of adequate justification for failure to do so.

Although the respondent carrier's practice in transporting the shipments over the higher-rated route may be characterized as an "unreasonable" one, nevertheless, it is not necessary to label it in such manner in order to state a cause of action. The allegations in the first count of the complaint (R. 1), employing the words "reasonable" and "unreasonable", are conclusory and mere surplusage and cannot have the effect of casting this simple misrouting action into the class of actions involving intrinsic unreasonableness of rates, proscribed by

T. I. M. E. supra. Although misrouting has been classified as an unreasonable practice, nevertheless, misrouting claims involve the payment of legal and supposedly reasonable charges resulting from the use of a higher rated route than an equally available lower rated route, each rate being the legal rate for its particular route, not whether either rate is unreasonable for application over its particular route. This difference, it is respectfully submitted, prevents the *T. I. M. E.* case from being applicable to claims for misrouting.

In this connection, it is interesting to note that the Courts below have grasped upon the word "unreasonable", which is used in the complaint, and have concluded in effect that because the same word is employed in *T. I. M. E.*, that case must necessarily be decisive of the case *sub judice*. We respectfully submit that such rationale, which plays upon the words "reasonable" and "unreasonable" and paraphrases the opinion of this Court in *T. I. M. E.*, amounts to no more than an exercise in semantics. In the last analysis we are not dealing here with the reasonableness of rates as was done in *T. I. M. E.*

In the case of *Miller* v. *Davis, Director General of Railroad*, 213 Iowa 1091 (Sup. Ct. Iowa, 1932), a misrouting action, the Court said in part:

> "This is not a case in which the reasonableness of a rate is involved. It is a case in which it is claimed the wrong rate was applied because the goods were shipped by the wrong route, contrary to the rights of the shipper."

In the case of *Galveston, H. & S. A. Ry. Co.* v. *Lykes Bros.*, 294 Fed. 968 (U. S. D. C., S. D., Texas, 1923), the Court recognized the principle that where a shipper gives no routing directions, and the carrier forwards the traffic over one route when another route carrying a lower rate is equally available, the carrier must refund to the shipper the differ-

ence between the higher rate and the rate applying over the less expensive route. The Court said, at page 973:

> "This, then, is not a case of reparation on account of unlawful or unreasonable tariffs."

In *Northern Pacific Ry. Co.* v. *Solum*, *supra*, this Court said at page 482:

> "In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route. But the duty is not an absolute one. The obligation of the carrier is to deal justly with the shipper not to consider only his interests and to disregard wholly, its own and those of the general public. If, all things considered, it would be unreasonable to ship by the cheaper route, the carrier is not compelled to do so. The duty is upon the carrier to select the cheaper route only 'if other conditions are reasonably equal'."

This Court held that whether the conditions are reasonably equal presents an administrative question for the Interstate Commerce Commission. If the Commission should determine that the "conditions are reasonably equal," it must be concluded that the carrier violated its obligation to the shipper to ship by the cheaper route, and the shipper is entitled to recover in a court of law the difference between the charges paid and those that would have accrued over the cheaper route.

In the case at bar, the petitioner filed a complaint with the Interstate Commerce Commission seeking an administrative finding as to whether the facts surrounding the movement justified the conduct of the respondent carrier in transporting the considered shipments over the higher rated interstate route, so that such finding would be in aid of the Court in determining whether petitioner is entitled to prevail in this action. Cf. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59 (1956). It is respectfully submitted that the Commission had power to make such finding. While *T. I. M. E.*

deprives the Commission of jurisdiction to determine the intrinsic reasonableness of past motor carrier rates, that case should not be interpreted so as to entirely prohibit the Commission from making findings of any other administrative issues in aid of the courts in litigation pending therein.

In *Riss & Company* v. *Association of American Railroads*, 178 F. Supp. 438 (District of Columbia, 1959), the Court in discussing *T. I. M. E.*, said at page 446:

> "This Court does not hold that *all* common-law remedies heretofore available at common law against motor carriers did not survive the Motor Carrier Act of 1935 * * *."

It is submitted that *T. I. M. E.* does not authorize the abolition of a cause of action for motor carrier misrouting. The factors that persuaded the majority of the Justices in that case to make their decision are not present in a case of misrouting. This rationale is well expressed in the analysis made by Judge Moore in his dissenting opinion, below (R. 27-32). Whereas Congress has provided the shipper with an opportunity to protest the reasonableness of rates filed by motor carriers with the Interstate Commerce Commission before the effective date thereof, no similar protection is afforded a shipper against misrouting by a carrier. See *Common Law Remedy of Recovering Reparations for Unreasonable Routing by Motor Carrier Held Abrogated by Motor Carrier Act*, 62 Columbia Law Review, 521-526 (March 1962) for a criticism of this Court's decision in *T. I. M. E.* and an analysis of whether the *T. I. M. E.* rationale was properly applied to the instant case.

The Motor Carrier Act specifically provides that all remedies not inconsistent with its provisions survive its passage. We fail to perceive in what manner the common law right asserted by the petitioner can be deemed inconsistent with the provisions of the Act. The mere omission of a provision in the Act granting such remedy does not have the effect of

extinguishing it. Nor does the Act destroy the common law remedy merely because an administrative finding may be required to determine whether conditions would make it unreasonable to ship by the cheaper route. Insofar as that issue is concerned there is no obstacle, statutory or otherwise, to the application to the present case of the doctrine of primary jurisdiction as defined and explained in *United States* v. *Western Pacific R. Co., supra,* and *United States* v. *Chesapeake & Ohio Railway Co.,* 352 U. S. 77 (1956). It is respectfully submitted that the petitioner had a right to commence a common law action to recover the damages it sustained by reason of the carrier's misrouting of its shipments, and to have the Court refer the incidental administrative issue to the Interstate Commerce Commission as an aid to the Court in rendering judgment in the case.

In *West Tennessee Motor Express, Inc.* v. *Dyersburg Cotton Products, Inc.,* 298 F. 2d 710 (6th Cir. 1962), the doctrine of primary jurisdiction was applied to a case where a motor carrier brought an action to recover unpaid freight charges and the defendant shipper requested that the issue of applicability of tariffs, as well as construction and definition of terminology in the tariffs, be referred to the Interstate Commerce Commission for determination in aid of the Court. The Court of Appeals held that the shipper's request was proper and, thereupon, the court proceedings were stayed pending the Commission's determination of such administrative issue.

Certainly, equity and good conscience would dictate, that under the circumstances existing in this case, as well as in all misrouting cases, the shipper should have a remedy for the patent wrong committed by the carrier. In the case at bar, the carrier by its own wrongful conduct has become unjustly enriched at the expense of the shipper in the sum of $10,000.00 No carrier should be permitted to take refuge in this Court's decision in the *T. I. M. E.* case in an effort to be immunized against liability for such wrong. If this

Court allows the decision of the Courts below to become the law of the land, some motor carriers may be tempted to prey upon the unprotected shippers by resorting to the technique of misrouting shipments and mulcting the shipping public of millions of dollars a year without fear of civil prosecution. *T. I. M. E.* should be limited to its own facts and should not be extended to deprive shippers of their common law right to recover damages for carrier misrouting. It is respectfully submitted that the instant suit to recover for misrouting is judicially cognizable and that the Courts below were in error in making a contrary determination.

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED AND THE CAUSE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

Respectfully submitted,

Harry Teichner

HARRY TEICHNER,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 37

HEWITT-ROBINS INCORPORATED,
Petitioner,

v.

EASTERN FREIGHT-WAYS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

MILTON D. GOLDMAN,
29 Broadway,
New York 6, N. Y.,
Attorney for Respondent.

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BRIEF FOR RESPONDENT

Statute Involved

In addition to subdivision (j) of Section 216, specified by the petitioner, there is more directly involved upon this appeal subdivision (b) of Section 216 of the Motor Carrier Act [49 U. S. C. 316(b)], fully set forth in the Appendix hereto.

Question Presented

In accordance with Rule 40(3) of this Court, the respondent submits that the true question presented upon this appeal is

Whether Section 216 of the Motor Carrier Act created a statutory cause of action whereby a shipper of goods may recover a portion of rates paid in accordance with applicable filed tariffs, upon a finding by the Interstate Commerce Commission that the carrier's use of the higher rated of two available routes was unreasonable within the meaning of Section 216 of the Motor Carrier Act.

Statement

Under well-established principles, the allegations of the complaint (R. 1-3) must be given their fair import and be accepted as true for the purposes of this appeal. Nevertheless the petitioner has not alleged that during the two years in question it never acquiesced in the use of the interstate route, or that there was never an agreement for interstate carriage at the applicable rate now assailed as excessive. Nor is there any allegation that the respondent was guilty of fraud or discriminatory practices.

The petitioner's action is predicated solely on the bald fact that the respondent routed the shipments in question over its higher rated interstate route, and the alleged right to recover is specifically assigned to the regulatory provisions of the Motor Carrier Act (the "Act"). Thus the complaint, obviously prepared with great care, declares that "The action arises under Part II of the Interstate Commerce Act, U. S. Code, Title 49, Sections 301 to 327, inclusive, as hereinafter more fully appears" (R. 1), and the gravamen is expressed to be a "violation of Section 216, Part II, of the Interstate Commerce Act" (R. 2). This is and has been the theory of petitioner's action, as conclusively evidenced by its immediate resort to the Interstate Commerce Commission (the "Commission") for a determination of reasonableness under Section 216 of the Act.

The respondent's answer denies the petitioner's allegations of unreasonableness and contains three affirmative defenses. The third defense alleges, *inter alia*, that the petitioner agreed to the use of respondent's interstate route by way of respondent's New Jersey terminal for the purpose of assembly, breakdown and delivery, and that petitioner's less-than-full load shipments could not be handled as direct intrastate shipments (R. 7). Thus, the reasonableness of respondent's routing practice was squarely placed in issue by the pleadings.

This appeal, then, does not involve the question of a shipper's right to recover based on fraud, discrimination, overcharges, or any deliberate wrong, but only on a post-shipment finding by the Commission that the carrier's routing practice was inherently unreasonable as that standard is construed under the Act.

ARGUMENT

I

The complaint purports to plead only a *statutory* cause of action which the *T.I.M.E.* case squarely held was not created by the Motor Carrier Act.

Whether the petitioner's complaint be regarded as attempting to plead a statutory or common-law cause of action, it fails to present a justiciable issue upon which relief may be granted. However, the most liberal construction of the complaint fails to disclose reliance upon a common-law right.

The complaint and subsequent proceedings before the Commission very clearly reveal the petitioner's understanding of its rights and the law when it brought its action. The petitioner properly recognized (1) that the respondent's duty to adopt reasonable routing practices was governed solely by Section 216 of the Act, and that (2) the reasonableness of the routing practice in question was determinable by the Commission in the exercise of its primary jurisdiction. The petitioner's claimed right of recovery was predicated solely upon the respondent's alleged failure to comply with a statutory duty. However, when confronted by respondent's motion to dismiss under the authority of this Court's decision in *T.I.M.E., Inc.* v. *United States*, 359 U. S. 464 (1959), the petitioner adapted the government's alternative common-law argument made in that case to the circumstances of the case at bar.

The respondent emphasizes the foregoing principally to illustrate to this Court that shippers and carriers alike

have understood and accepted the exclusivity of the Act, and its pre-emptive effect, insofar as it fixes and attempts to regulate with uniformity the several duties of motor carriers engaged in interstate commerce, including the duty to adopt reasonable routing practices.

Section 216(b) of the Act, upon which the complaint is predicated, does not create a cause of action to recover reparations for violations thereof.

T.I.M.E., Inc. v. *United States*, *supra*, at 469; *cf. Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246 (1951).

The decision in the *T.I.M.E.* case is unanimous upon this point. This Court held that Section 216 established "only a 'criterion for administrative application in determining a lawful rate' rather than a justiciable legal right" (at p. 469).

Although the precise duty in issue in the *T.I.M.E.* case was the duty to establish reasonable rates, this Court's construction was very evidently placed upon the entirety of Section 216(b) and the several duties imposed therein. As was held by the Commission in the instant case, the duty to adopt reasonable routing practices is enjoined by that Section.

Hewitt-Robins Incorporated v. *Eastern Freight-Ways, Inc.*, 302 I.C.C. 173, 174 (1957).

This is recognized and conceded by the petitioner's complaint.

The applicability to this case of the holding in *T.I.M.E.* is clear not only from this Court's broad language of construction, but from its underlying rationale as well. Thus,

the conclusion in *T.I.M.E.* upon this point was dictated by the compelling circumstances that the Act, unlike Parts I and III of the Interstate Commerce Act, withheld reparations procedures for violations of the Act, and that attempts to amend the Act to include such provisions were consistently unsuccessful. The Act withheld reparations not only for unreasonable rates, but any other unreasonable practices including the collection of applicable rates deemed excessive as a result of a routing practice deemed unreasonable. The proposed amendments were correspondingly broad. Thus, the amendments considered in 1947 and again in 1957 each provided:

> "In case any common carrier by motor vehicle subject to the provisions of this part shall do * * * *any act, matter or thing in this part prohibited or declared to be unlawful,* * * * such carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation * * *." (Emphasis supplied.)
>
> Hearings before Senate Committee on Interstate and Foreign Commerce on S. 378, 85th Cong., 1st Sess. (1957);
>
> Hearings before House Committee on Interstate and Foreign Commerce on H.R. 2324, 80th Cong., 1st Sess. (1947).

Significantly, identical legislation was again unsuccessfully proposed *after* this Court's decision in *T.I.M.E.* (See H.R. 8031, dated June 30, 1959).

The foregoing, together with other legislative history discussed in part 2 of the *T.I.M.E.* opinion, make it abundantly clear that Section 216(b) did not create a cause of action in favor of a shipper under the circumstances of this case.

II

There is no surviving common-law right upon which the Petitioner can predicate a recovery.

The respondent feels the petitioner has presented this Court with a moot question, in light of the pleadings and circumstances of this case. However, the grant of certiorari by this Court compels argument upon the merits of that contention which is not only unsupportable in legal principle, but is bereft of any equity as well (see "The Equities," *infra*).

Second T.I.M.E. Holding Controls

The petitioner's contention should be rejected under the second holding in *T.I.M.E.*, to wit, that Section 216(j) of the Act [49 U.S.C., [316(j)] did not preserve any pre-existing common-law right to recover reparations on account of rates deemed unreasonable under the Act.

The second *T.I.M.E.* holding was grounded upon the fact that the issue of reasonableness was subject to the primary jurisdiction of the Commission. Accordingly, this Court held that the reparations procedure contended for was incompatible with the Act because (1) the Courts would have "no authority to adjudicate the primary question in issue" (at page 474), and (2) the Commission would be permitted "to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly" (at page 475).

The foregoing rationale is applicable with equal force to the instant case. The sole issue tendered by the *factual allegations* of the complaint is whether the respondent's routing practice was unreasonable. "Misrouting is an

unreasonable practice violative of the provisions of Section 216(b) of the act * * *."

> *Hewitt-Robins, Incorporated* v. *Eastern Freight Ways, Inc., supra*, at p. 174

This issue falls squarely within the primary jurisdiction of the Commission.

> *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 483 (1918);
>
> *Miller* v. *Davis*, 213 Iowa 1091, 230 N. W. 743, 744-45 (1932);
>
> *Great Atlantic & Pacific Tea Co.* v. *Ontario Freight Lines Corp.*, 461 I.C.C. 237, 238-39 (1946);
>
> *Kahn*, Principles of Motor Carrier Regulation 156 (1958);
>
> *cf. T.I.M.E. Inc.* v. *United States, supra;*
>
> *cf. Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1906).

The petitioner concedes the Commission's primary jurisdiction over the sole issue in this case (Pet. Brief, pp. 10, 12). Thus, there is no dispute upon the crucial predicate of the *ratio decidendi* in *T.I.M.E.* The same conclusion inexorably results.

The remedy urged by petitioner (Pet. Brief, p. 12) is utterly repugnant to the scheme of the Act which pronounces a general policy of regulation without reparation. It would entail a hybrid *non-statutory* procedure which would constitute the Court as the mere paying agent of the Commission, from whom Congress has specifically withheld

the reparations power. This result falls squarely within the prohibition of *T.I.M.E.*, and the authorities which guided this Court's sound conclusion.

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co., supra;*

Texas & Pacific R. Co. v. *Abilene Cotton Oil Co., supra.*

The Act's legislative history which was considered in *T.I.M.E.* is equally persuasive here. It dictates the conclusion that Congress did not intend that the Act would be survived by a common-law right of action to recover a portion of rates deemed excessive as a result of an unreasonable routing practice. The Court is respectfully referred to the discussion on legislative history under Point I of this brief.

Apropos of the issue here is *Consolidated Freightways, Inc.* v. *United Truck Lines, Inc.*, 216 F. 2d 543 (9th Cir. 1954). In that case the Court held that the scheme of the Act precluded the maintenance of an action by one carrier against another for unfair competition. In so holding it declared:

> "In contrast with Part I, Part II is silent as to any private remedy for a violation of any of its provisions. This omission is significant, and persuades us that Part II is to be regarded as a wholly independent legislative enactment in which Congress deliberately elected to provide no remedies for violation of any of its provisions other than those carefully spelled out in Part II itself" (at p. 545).
>
> * * *
>
> "It is abundantly clear that Congress intended regulatory controls to be exercised by the Commis-

> sion and not by or through individuals. There is absolutely no indication in this Act or in case law that private suits might be resorted to, to aid the Commission in its enforcement of the Act and regulations thereunder" (at p. 547).

Consolidated Freightways correctly prophesied the decision in *T.I.M.E.*, and represents an excellent expression upon the Congressional intent to be considered on this appeal.

Petitioner's Contentions

The petitioner utterly fails to suggest one cogent reason why *T.I.M.E.* does not require an affirmance here.

1. The hypothesis of petitioner's argument seems to be that there is an enforceable common-law standard or duty which derives its substance from some authority independent of Congress and the duty expressed in Section 216(b) of the Act. Even were this possible, the petitioner fails to establish the applicable law of New York State which, under its theory, would govern the shipments in question. However, even to suggest that New York law would govern the respondent's duties reveals the fallacy of the petitioner's contention.

Under established principles of federal pre-emption, the prescription by Congress of certain duties under Section 216, as administered by the Commission, superseded and abrogated all existing common-law standards prevailing in the various jurisdictions with respect to the same subject matter.

> *Consolidated Freightways, Inc. v. United Truck Lines, Inc.*, *supra*, at 547;

Cf. *W. R. Grace & Co. v. Railway Express Agency, Inc.*, 8 N. Y. 2d 103, 105 (1960).

That was the essential purpose of the Act—uniform regulation. Were the petitioner correct in principle, motor carriers would be bound by the Act and, simultaneously, by multiple standards at possible variance with Section 216, each subject to change by the jurisdiction concerned. Such a proposition is untenable. There is no dual standard. If a routing practice is reasonable under Section 216, it is not otherwise open to attack. If it should be held to violate that Section, no other standard is competent to justify it.

The pre-emptive character of Section 216 should, it is respectfully submitted, conclude this entire controversy under the first holding in *T.I.M.E.* If a failure to comply with Section 216 was not intended by Congress to give rise to an actionable wrong, there would seem to be no need to consider whether a proposed "common-law" remedy is compatible with the Act, as was done in *T.I.M.E.* There is no other duty to enforce.

Petitioner incorrectly suggests there have been adjudications which recognize a surviving common-law remedy. *Woolgar Transportation Co. v. George Rathdge Co.*, 162 F. 2d 1016 (3d Cir. 1947), merely held that the carrier was bound by its *express contract* of intrastate carriage which it could not unilaterally abridge by using an interstate route without justification.

Exceedingly inaccurate is petitioner's recital upon *S. W. Shattuck Chemical Co. v. T. & M. Transp. Co.*, 134 F. 2d 294 (10th Cir. 1943) and *T. & M. Transp. Co. v. Shattuck Chemical Co.*, 148 F. 2d 777 (10th Cir. 1945). It was there held that where a shipper knows a specific

route will be used, the carrier may recover the applicable rate although it had originally quoted a lesser rate to the shipper. However, there was *dicta* in *Shattuck* to the effect that a carrier may be liable in damages where it affirmatively misrepresents which route will be used. Neither *Woolgar*, nor *Shattuck* was concerned with shipments tendered wholly enrouted, the reasonableness of a routing practice, the jurisdiction of the Commission, or the effect of the Act upon the issue presented by the instant case. Moreover, those decisions antedate *T.I.M.E.*

2. Arguing that the Act did not abolish *all* common law actions, petitioner cites *Riss & Company* v. *Association of American Railroads*, 178 F. Supp. 438, 446 (D. C. Cir., 1959). Although *Riss* does make that general statement (with which respondent does not disagree), it properly acknowledged that under the *T.I.M.E.* and *Abilene* decisions, *supra*, the Act extinguished all common-law actions which are *inconsistent* with the statutory plan. Accordingly, it denied the right of the defendant railroad to counterclaim for loss of profits against the plaintiff motor carriers on account of alleged unlawful competition.

Just as Section 216(j) provides, the Act concededly did not extinguish "any remedy or right of action not inconsistent" therewith. However, the remedy sought here, just as the one rejected in *T.I.M.E.*, is inconsistent. An action for overcharges may be maintained not only because it does not involve the administrative judgment, but because Section 204(a) of the Act specifically recognizes it. It is consistent with the Act. The case at bar is not an action to recover overcharges.

Kahn, op. cit. supra, at p. 156;

Great Atlantic & Pacific Tea Co. v. *Ontario Freight Lines Corp., supra* at 239;

Miller v. *Davis*, *supra*, at 744;

cf. *Brown Coal Co.* v. *Director General*, 87 I.C.C. 130, 131 (1923);

a distinction precisely made in *Miller* v. *Davis*, *supra*.

3. That this case involves only the issue of reasonableness is clearly established by the authorities cited above under "Second *T.I.M.E.* Holding Controls". Petitioner attempts to neutralize this obvious proposition by disowning those allegations of its complaint (Pet. Brief, pp. 8-9), and quoting language out of context from *Galveston, H. & S. A. Ry. Co.* v. *Lykes Bros.*, 294 Fed. 968 (S. D., Texas, 1923), and *Miller* v. *Davis*, *supra*. Neither of those cases support the petitioner. *Lykes Bros.* was concerned only with the effect of a stipulation of settlement of a rate claim upon the carrier's right to recover an amount in excess of the settlement. *Miller* v. *Davis* was concerned only with a shipper's right to recover the excess amount of rates where the carrier did not plead in justification of the more expensive route. Had the carrier so pleaded, *Miller* v. *Davis* specifically held there would be a question of reasonableness for the Commission (240 N. W. at 744-45).

Petitioner's insistence upon characterizing the issue as "misrouting" is merely the use of semantics to avoid an inevitable result. It is a particularly pointless tactic in view of petitioner's own admission that the issue relating to respondent's routing practice is referable to the Commission, and the Commission's holding that misrouting is an "unreasonable practice".

4. Petitioner argues that the Commission may function in aid of the Court just as it did in *United States* v. *Western Pac. R. Co.*, 352 U. S. 59 (1956), and *United States* v.

Chesapeake & Ohio Ry. Co., 352 U. S. 77 (1956). However, in those cases the right to recover was conferred by statute and was unchallenged. The question here is not whether the Commission has jurisdiction of the issue, for the petitioner concedes that, but whether its primary jurisdiction negates a legislative intent to permit a remedy which was specifically withheld. This distinction was well made in *T.I.M.E.* at page 475. *West Tennessee Motor Express, Inc.* v. *Dyersburg Cotton Products, Inc.*, 298 F. 2d 710 (6 Cir. 1962), is inapplicable for the reason, among others, that it was an action by a *carrier* to recover a filed tariff. The question of the applicability of the tariff was referred to the Commission.

5. As its last line of attack, the petitioner attempts to distinguish the *T.I.M.E.* decision upon the ground that Sections 216 (g) and 217 (c) afford protections against unreasonable rates which are not available with respect to routing practices. In the first place, the decision in *T.I.M.E.* was clearly not predicated upon those sections. But more important, the fact is that subdivisions (e) and (g) of Section 216 [49 U. S. C. §316 (e) (g)] afford the same measure of administrative scrutiny over routing practices, and the same opportunity for shippers to file complaint. There is no need to discuss those sections. Their provisions are clear.

The Equities

The petitioner seeks to strengthen its legal argument by attempting to construct a foundation of equity in its favor. (Pet. Brief, pp. 12-13). In point of fact, the balance of equities is with the respondent.

As noted under "Statement", *supra*, the complaint does not allege fraud, discrimination or even deliberate mis-

routing by the respondent. Such a charge would be unfounded. Moreover, any extended or flagrant conduct of that kind would subject a carrier to penalties far too severe to warrant the risk for the sake of *a few dollars*. The Court's attention is respectfully directed to Sections 212, 216(d)(e)(g), 217(a), 218(a), and 222 of the Act [49 U.S.C. §§ 312, 316(d)(e)(g); 317(a), 318(a) and 322]. There is ample provision in the Act, as well as in general criminal statutes, to prevent and punish any motor carrier which, as the petitioner phrases it, "may be tempted to prey upon the unprotected shippers by resorting to the technique of misrouting shipments and pulleting the shipping public of millions of dollars a year without fear of civil prosecution" (Pet. Brief, p. 13).

The petitioner distorts the grievance it presses to redress. The Commission has merely found that the respondent instituted and maintained a routing practice which the circumstances did not warrant. There is not the slightest suggestion of wrongful conduct in the Commission's opinion which the Court is respectfully requested to examine. The issue was truly one of reasonableness.

An erroneous routing practice does not produce a windfall for the carrier where, as here, it merely charges the applicable rate under published tariffs. The rate has been approved by the Commission and is a fair charge for the service *actually* rendered. It is fixed under Section 216(i) [49 U.S.C. 316(i)] of the Act. Petitioner can hardly suggest that the carrier profits to the extent of the difference between the rate charged and the cheaper rate in this case an average of only $28.57 per shipment, assuming petitioner's demand is correct. A recovery against respondent would require it to return a sum in excess of the small margin of profit permitted. On the other hand, a recovery by petitioner would produce a windfall of

$10,000, with interest for approximately five years. Yet, petitioner's consignee and subsequent consumers have most assuredly absorbed the shipping costs at the rate regularly charged and now assailed as excessive.

To permit a recovery would subject every motor carrier in the nation to the devices of parasitic claims solicitors, who will volunteer to conduct audits and instigate claims solely for their own enrichment. The case at bar is one such example—a lawsuit after 350 shipments upon a regular basis at the applicable rate. A sudden rush of claims would hardly benefit shippers or the general public, and they would make no significant contribution to the regulation of the motor carrier industry.

The respondent does not contend that shippers should be obligated to pay rates in excess of those applicable to the least expensive reasonable route. It does contend, however, that the Act seeks to protect them by way of regulation only, which includes a procedure whereby, as in the instant case, a shipper may contest the reasonableness of a routing practice and procure its termination. If a reparations remedy is to be engrafted upon the statutory scheme, it must be by legislative enactment.

The *T.I.M.E.* case and sound principles of law would seem clearly to require an affirmance of the judgment entered below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

MILTON D. GOLDMAN,
Attorney for Respondent.

WILFRED R. CARON,
of Counsel.

APPENDIX

Subdivision (b) of Section 216 of Part II of the Interstate Commerce Act (49 U. S. C. § 316(b)) provides as follows:

> "(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce."

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RESPONDENT'S SUPPLEMENTAL MEMORANDUM

MILTON D. GOLDMAN,
29 Broadway,
New York 6, N. Y.,
Attorney for Respondent.

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RESPONDENT'S SUPPLEMENTAL MEMORANDUM

Upon the oral argument of the above entitled appeal, counsel for the Petitioner observed that the Motor Carrier Act does not contain language identical to Section 15(8) of Part 1 of the Interstate Commerce Act which provides that a shipper, "subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination * * *"

On the other hand, counsel for the Respondent advised the members of this Court that routing instructions furnished by a shipper are, as a matter of practice, honored by the Respondent unless it is not practicable so to do. That statement has been confirmed during subsequent conferences had between counsel and certain responsible representatives of the Respondent.

Although the specific language of Section 15(8) of Part 1 is not to be found in Part 2 of the Act, it does not appear that it has ever been decided whether a shipper nevertheless has such a right by implication in light of the statutory scheme and legislative purpose. The absence of specific language does not necessarily require the conclusion that a shipper by motor carrier has no right to designate one of two or more available through routes. In any event, the Respondent respectfully submits that the absence of such specific statutory language in the Motor Carrier Act has no legitimate bearing upon the narrow issue presented upon this appeal. That issue arises out of the Petitioner's hypothesis that its shipments were tendered *unrouted*. It does not require a determination as to whether under the Motor Carrier Act a shipper has a right to designate one of two or more available through routes, nor does it involve any question of liability resulting from the failure of a motor carrier to conform to such routing instructions.

The only question presented for decision is whether the Motor Carrier Act permits the recovery of reparations where the Interstate Commerce Commission, *applying the statutory standard of reasonableness*, has disapproved a motor carrier's routing practice—not because it constituted a deliberate wrong, but because circumstances proven in justification were deemed insufficient. In other words, was the *statutory duty* of Section 216 intended to

create a right of recovery which can be adjudicated solely by the Commission from whom the power to award reparations was specifically withheld by Congress? The Respondent contends that these questions should be answered in the negative.

Respectfully submitted,

MILTON D. GOLDMAN,
Attorney for Respondent.

WILFRED R. CARON,
of Counsel.